

MEO Protest Rights: Due Process Without Purpose

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## I. INTRODUCTION

The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

The competitive sourcing arena became an even more contentious environment when President George W. Bush signed into law H.R. 4200, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.<sup>1</sup> Section 326 of the Act amended the Competition in Contracting Act (CICA)<sup>2</sup> by providing specifically that government officials, known as agency tender officials (ATOs), may file protests in connection with A-76 competitions at the Government Accountability Office (GAO)<sup>3</sup> on their own initiative or at the request of a majority of employees involved in the competition.<sup>4</sup>

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<sup>1</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, 118 Stat. 1811 (2004), [hereinafter Defense Authorization Act for Fiscal Year 2005]. See Appendix.

<sup>2</sup> 31 U.S.C. §§ 3551-3556 (2004).

<sup>3</sup> Effective July 7, 2004, the GAO's legal name became the Government Accountability Office. The GAO was previously known as the Government Accounting Office.

<sup>4</sup> Defense Authorization Act for Fiscal Year 2005, *supra* note 1.

This thesis will explore the issue of providing standing to ATOs to challenge competitions conducted under the revised Office of Management and Budget (OMB) Circular A-76. The first part summarizes recent policy changes that laid the groundwork for the 2004 amendments to CICA and also illustrates how the CICA amendments are part of a larger effort to reform the A-76 process. The next part focuses on the impact of these amendments on different key players--focusing on federal employees, their unions and contractors. This section also summarizes the impact of the amendments upon the government and discusses the role of the ATO and the ethical and legal concerns raised by that role. Next, this thesis examines how the amendments affect GAO and the protest process, focusing on protective orders and intervenors. Finally, this thesis explores how the amendments will affect the standing requirements of the United States Court of Federal Claims (COFC). This thesis concludes by commenting on the overall potential of these amendments to secure increased accountability in the protest process and whether these amendments provide any degree of protection for federal employees whose jobs are subject to a public-private competition.

## II. A-76 REFORM AND THE REVISED CIRCULAR

The 2004 CICA amendments stemmed from a larger effort to reform the entire A-76 process.<sup>5</sup> The A-76 process has been a frequent target of criticism,<sup>6</sup> and, therefore, reform efforts. These most recent efforts were distinctive in that they had the benefit/burden of the Administration's focus. Competitive sourcing was one of the five government-wide initiatives on the President's management agenda.<sup>7</sup> The Bush administration's focus on competitive

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<sup>5</sup> GENERAL ACCOUNTING OFFICE, COMMERCIAL ACTIVITIES PANEL, FINAL REPORT: IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002), [hereinafter COMMERCIAL ACTIVITIES PANEL REPORT], available at <http://www.gao.gov/a76panel/dcap0201.pdf>.

<sup>6</sup> See, e.g., Major Beth Harney, *The Quiet Revolution, Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48 (1998); Major Greg E. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F. L. REV.. 239 (1997); Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J.. 311 (2004); William A. Roberts, William Lieth, Janet L. Eichers, Phillip H. Harrington, *A-76 Cost Comparisons, Overcoming the Undue Built-In Bias Favoring In-House Performance of Services*, 30 PUB. CONT. L.J.. 585 (2001); Robert Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613 (2001); Stephen M. Sorett, Brad P. Bender, Lorraine T. Mullings, *The Crossroads of the A-76 Costs Debates, Cost Comparisons, and Some Attractive Alternatives*, 31 PUB. CONT. L.J.. 47 (2001); Charles Tiefer & Jennifer Ferragut, *Letting Federal Unions Protest Improper Contracting Out*, 10 CORNELL J.L. PUB. POL'Y. 581 (2001).

<sup>7</sup> EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF AND MANAGEMENT BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA (2002), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt/pdf>. The five government-wide initiatives include: (1) strategic management of human capital, (2) competitive sourcing, (3)

sourcing was centered on metrics and quotas. The administration initially set the goal of competing five percent of all federal jobs deemed commercial in nature in FY 2002, and increased that number by ten percent in FY 2003.<sup>8</sup> The OMB also set a goal of competing 50 percent of the jobs identified as commercial for agencies to achieve a green score for competitive sourcing on their balanced scorecard.<sup>9</sup> But focusing on metrics and quotas proved troublesome. After meeting from resistance from several fronts<sup>10</sup> the administration jettisoned government-wide quotas and OMB opted for to set individual targets tailored to each agency.<sup>11</sup> As part of its competitive sourcing initiatives, the Bush administration desired to significantly revise Circular A-76.

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improved financial performance, (4) expanded electronic government, and (5) budget and performance integration.

<sup>8</sup> See Office of Management and Budget M-01-15, Performance Goals and Management Initiatives for the FY 2002 Budget (March 9, 2001).

<sup>9</sup> *Id.*

<sup>10</sup> *Competitive Sourcing and the Morale of Federal Employees, Hearing Before the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., 108-42 (2003) (statement of Frank Camm, RAND Senior Economist).

<sup>11</sup> Amelia Gruber, *OMB Eliminates Broad Competitive Sourcing Targets*, Gov't. Exec. Com., (July 24, 2003) at <http://www.govexec.com/dailyfed/0703/072403a1.htm>.



#### A. Commercial Activities Panel Report

The spearhead of this reform effort was the Commercial Activities Panel (Panel).<sup>12</sup> Congress required the Comptroller General to "convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the Federal Government from Government personnel to a Federal contractor."<sup>13</sup>

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<sup>12</sup> Floyd D. Spence National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221-22 (2001); see also GENERAL ACCOUNTING OFFICE. The Commercial Activities Panel members included: E.C. "Pete" Aldridge, Jr. (Under Secretary for Defense for Acquisition, Technology and Logistics, Kay Coles James (Director-U.S. Office of Personnel Management), Angela B. Styles (Administrator, Office of Federal Procurement Policy), Mark C. Filteau (President, Johnson Controls World Services, Inc.), Stan Z. Soloway (President, Professional Services Council), Frank A. Camm, Jr. (Senior Analyst, RAND), Stephen Goldsmith (Sr. Vice President, Affiliated Computer Services), Bobby L. Harnage, Sr. (National President, American Federation of Government Employees), Colleen Kelley (National President, National Treasury Employees Union), the Honorable David Pryor (Director, Institute of Politics, Harvard University), Robert M. Tobias (Distinguished Adjunct Professor, American University), David M. Walker (Comptroller General of the United States). Commercial Activities Panelist Biographies, available at <http://www.gao.gov/a76panel/bios/panelbios/html>.

<sup>13</sup> *Id.* The Panel's Executive Summary identified both the underlying purpose of the A-76 process and the likely focus of any intended reforms:

In identifying key areas for reform, the Panel unanimously agreed upon ten principles that should guide all administrative and legislative actions in making source selection policy.<sup>14</sup> Principle No. 10 touched tangentially

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[T]he government's goal is and always should be to obtain high-quality services at a reasonable cost. Stated differently, the government should strive to achieve outcomes that represent the best deal for the taxpayer. Achieving this goal is a significant challenge. But there can be little doubt that identifying the right processes that will lead to results consistent with this goal is critical...The mission of the Commercial Activities Panel is to improve the current sourcing framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns.

See also David M. Walker, *The Future of Competitive Sourcing*, 33 PUB. CONT. L. J. 299, 302 (2004):

Competitive sourcing is a means to an end; it is not an end in and of itself. The purpose of Government is not to run sourcing competitions, and certainly not to out-source. So it is of critical importance that we keep our focus on why Government exists, what roles, and functions it is trying to accomplish, and how competitive sourcing fits within that broader framework. We need to ask some fundamental questions, such as: Should the Government be involved in certain work at all? Which work should by its very nature never be outsourced? Why is certain work done by federal employees and other work performed by contractors? What result is the Government trying to achieve?

<sup>14</sup> COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 5, at 46-48. The ten sourcing principles include the following: (1) support agency missions, goals, and objectives; (2) be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce; (3) recognize that inherently governmental and certain other

upon the issue of providing federal employees the right to protest the conduct of competitions under A-76:<sup>15</sup>

Accountability serves to assure federal workers, the private sector, and the taxpayers that the sourcing process is efficient and effective. ... Accountability requires... methods to track success or deviation from objectives, feedback to affected parties, and enforcement mechanisms to align desired objectives with actual performance.<sup>16</sup>

To ensure accountability in connection with all sourcing decisions, a supermajority of the Panel raised the issue of providing standing to federal employees to challenge sourcing decisions before GAO or federal courts.<sup>17</sup>

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functions should be performed by federal workers; (4) create incentives and processes to foster high-performing, efficient, and effective organizations throughout the federal government; (5) be based on a clear, transparent, and consistently applied process; (6) avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals; (7) establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles; (8) ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible; (9) ensure that competitions involve a process that considers both quality and cost factors; and (10) provide for accountability in connection with all sourcing decisions.

<sup>15</sup> *Id.* at 48.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 49. With regard to standing, a supermajority of the Panel (including the three industry members, the three

The Panel did not expressly adopt this right as one of its unanimous principles, but several members, including the Comptroller General, echoed support for this reform.<sup>18</sup>

One of the logical outgrowths of the Panel's recommendations was increased emphasis on revising the A-76

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members of the Bush administration, and the Comptroller General) found that:

[T]he current sourcing system, including the A-76 process, is not consistent with its recommended principles. ... [A]ll parties - taxpayers, agencies, employees, and contractors - would be better served by conducting private-private competitions under the framework of the Federal Acquisition Regulation. The Panel recommends, therefore, that the government take immediate steps to develop a process that uses the Federal Acquisition Regulation as the framework for conducting public-private competitions... Although some changes in the process will be necessary to accommodate the public-sector proposal, the same basic rights and responsibilities would apply to both the private and the public sectors, including accountability for performance and the right to protest.

<sup>18</sup> Walker, *supra* note 12, at 310:

It is important to hold agencies accountable for running the competitions fairly and consistent *with these principles*. One key way is to ensure that is by allowing the losing side to challenge the result. Challenges provide transparency, and transparency can play a key role in holding the players in these competitions accountable. Bid protests, whether at GAO or the U.S. Court of Federal Claims (COFC), are one way to do that. ...In my view, having a way for the MEOs to protest would engender a perception of fairness, which is important to creating trust in the A-76 process, as well as to helping increase transparency and improve accountability in this important area.

Circular and improving the outsourcing (competitive sourcing) mechanism.<sup>19</sup>

#### B. Revised A-76 Circular

In the revisions to the Circular, OMB established a new policy for the competition of commercial activities.<sup>20</sup> To emphasize the importance of competition, the revised Circular deleted the longstanding tenet that the government should not compete with its own citizens.<sup>21</sup> It incorporated the concept of "public-private competition" to describe the process for determining how commercial activity should be performed. It also provided for the "use of streamlined or standard competition to determine if government personnel

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<sup>19</sup> Steven L. Schooner, *The Future of Competitive Sourcing: Competitive Sourcing Policy: More Sail than Rudder?* 33 PUB. CONT. L.J. 263, 267 (2004) [hereinafter Schooner, *Competitive Sourcing Policy*] ("Competitive sourcing involves determining, prospectively, whether government resources or the private sector offers the Government- - as a consumer--the best value in performing certain tasks. Outsourcing, on the other hand, entails replacing existing government personnel with contractors and relying upon the private sector when new tasks arise.")

<sup>20</sup> The revised Office of Management and Budget Circular No. A-76 [hereinafter OMB Circular A-76], available at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf). See also The Notice of Revision to the Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32134 (May 29, 2003) [hereinafter Notice of Revision].

<sup>21</sup> *Id.*

should perform a commercial activity.”<sup>22</sup> With the new standard competition procedures, the government’s “most efficient organization” (MEO) competes with all private offerors in a single solicitation.<sup>23</sup> The revised Circular dispensed with the previous two-track methodology that always resulted in the government’s proposal from the most efficient organization competing against the prevailing private sector company in favor of the new single-track process. A single set of evaluators use essentially the same rules to evaluate all bids or offers from the public and private sector.

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<sup>22</sup> *Id.* at P4.c. The previous version of the Circular did not use the term “public-private competition” or “competition” when referring to the method for determining performance of a commercial activity, but did refer to the in-house Management Plan as the “in-house offer” when the Source Selection Authority for the private sector competition was to evaluate whether or not the same level of performance and performance quality would be achieved in-house.

<sup>23</sup> *Id.* at attch. B, PA.5.a. (“An agency shall use a standard competition if, on the start date, a commercial activity is performed by: (1) the agency with an aggregate of 65 or fewer FTEs (full-time equivalent); or (2) a private sector or public reimbursable source and the agency tender will include an aggregate of more than 65 FTEs.” Standard competitions may use either the sealed bid method; the negotiated acquisition method using the lowest priced technically acceptable method of source selection; a negotiated acquisition method using the phased evaluation source selection process; or a negotiated acquisition using the trade-off source selection process.)

An agency must determine whether commercial activities should be provided by a private sector provider through contract, by government personnel through a letter of obligation, or by a public reimbursable source through a fee-for-service agreement.<sup>24</sup> In standard A-76 competitions, the government must submit an "agency tender" in response to the solicitation.<sup>25</sup> The ATO designates the most efficient organization (MEO) team members and is charged with developing, certifying, and representing the agency tender as a "directly interested party."<sup>26</sup> If the standard competition results in a decision to implement the agency tender, the contracting officer (CO) must establish an MEO "letter of obligation" with an official responsible for performance of the MEO.<sup>27</sup> The contracting officer "shall incorporate appropriate portions of the solicitation and the agency tender into the letter of obligation."<sup>28</sup>

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<sup>24</sup> *Id.* at attch. B, P.D.2.a.(Under the revised Circular, agencies must now conduct standard competitions in a twelve month timeframe, beginning with public announcement to performance decision date.)

<sup>25</sup> *Id.* at attch. B, P D.4.a.

<sup>26</sup> *Id.* at attch. B, P A.8.a.

<sup>27</sup> *Id.* at attch. B, P D. 6.f.

<sup>28</sup> *Id.* at attch.B.P.D.6.f.3.

With regard to conflicts of interest, the revised Circular includes rules that mirror the Federal Acquisition Regulation (FAR), subpart 9.5, Conflicts of Interest. The Circular mandates that the performance work statement (PWS) team, the MEO team, and the source selection evaluation board (SSEB) team must be separate and independent.<sup>29</sup> MEO team members are also precluded from participating in the SSEB in negotiated procurements. PWS team members may participate in the SSEB if they are not directly affected by the competition.

The OMB adopted these strict requirements to address situations where conflicts have arisen because federal employees evaluating the private sector proposals would appear to have an interest in A-76 competitions.<sup>30</sup> GAO found an unacceptable conflict of interest in *DZS/Baker; Morrison Knudsen Corp.* In that case, fourteen of the sixteen federal employees who were assisting with the evaluation of private sector proposals held positions at risk of being contracted out.<sup>31</sup> The conflict stemmed from the employees' desire to further their own (and the MEO's)

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<sup>29</sup> *Id.* at attch.B.P.A.8.a.

<sup>30</sup> *DZS/Baker, Morrison Knudsen Corp., Comp. Gen. B-281224 et al.*, Jan. 12, 1999, 99-1 CPD ¶ 19.

<sup>31</sup> *Id.*



interests by winning the competition in contrast to their obligation to write unbiased ground rules and fairly evaluate private sector proposals. In *Jones/Hill Joint Venture*, a conflict of interest existed where a Navy employee and a private sector consultant wrote and edited the performance work statement and then prepared the management plan for in-house performance.<sup>32</sup> "Given the use of the competitive system in Circular A-76 studies and the MEO team's status as essentially a competitor in the study, [GAO] believes that the provisions of subpart 9.5 serve as useful guidance in determining whether the type of conflict of interest prohibited under subpart 3.1 of the FAR exists...".<sup>33</sup>

In addition, the revised A-76 discarded the separate administrative appeals procedures developed under the prior Circular and established "contest" procedures governed by FAR 33.103.<sup>34</sup> The revised Circular gave "directly interested parties" the right to contest various aspects of the standard competition, such as the solicitation or its

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<sup>32</sup> *Jones/Hill Joint Venture*, Comp. Gen. B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> Federal Acquisition Regulation 33.103; OMB Circular A-76, *supra* note 20, at attch. B, P F.1.

cancellation, a determination to exclude an offer/tender from the competition, compliance with the costing provisions and other elements of the agency's evaluation, and terminations of a contest or letter of obligation.<sup>35</sup> Under the definition of "directly interested parties", the revised Circular included "a single individual appointed by a majority of directly affected employees as their agent," in addition to the agency tender official.<sup>36</sup>

#### C. GAO Notice

Shortly after OMB issued the revised Circular, GAO solicited comments on its revisions.<sup>37</sup> GAO explained the revised Circular raised the issue of federal employees and/or their union representatives having standing to protest A-76 competitions.<sup>38</sup> Historically, GAO has not granted standing to federal employees and/or their union representatives.<sup>39</sup> GAO sought comments "regarding two key

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<sup>35</sup> OMB Circular A-76, *supra* note 20, at attch. B, P F.1.

<sup>36</sup> *Id.* at attch. F.

<sup>37</sup> Notice Regarding Standing of In-House Entity, 68 Fed. Reg. 35411-413 (June 13, 2003) (to be codified at 4 C.F.R. pt. 21).

<sup>38</sup> Notice Regarding Standing of In-House Entity, 68 Fed. Reg. 35411-413.

<sup>39</sup> *Id.*

legal questions, namely, whether the revisions made to the Circular affect the standing to an in-house entity to file a bid protest" and "who would have the representational capacity to file such a protest."<sup>40</sup>

GAO noted the MEO must submit an "agency tender" in response to the solicitation that is evaluated at the same time as private sector offers.<sup>41</sup> In addition, the revised Circular required the CO to establish the "letter of obligation" with the MEO "which appears to bind the in-house entity, in at least a quasi-contractual way, to the terms of the solicitation and agency tender."<sup>42</sup> GAO also noted two recent protest opinions that were possibly relevant to the legal analysis of the issue.<sup>43</sup> First, GAO found that a public entity could be considered an interested party under CICA, even though a public entity would not be awarded a contract if it were successful in

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<sup>40</sup> Notice Regarding Standing of In-House Entity, 68 Fed. Reg. at 35411.

<sup>41</sup> Notice Regarding Standing of In-House Entity, 68 Fed. Reg. at 35412.

<sup>42</sup> *Id.*

<sup>43</sup> Federal Prison Indus., Comp. Gen. B-290546, July 15, 2002, 2002 CPD ¶ 112; Department of the Navy - Recon., Comp. Gen. B-286194.7, May 29, 2002, 2002 CPD ¶ 76.

the competition.<sup>44</sup> Second, GAO found that even under the prior Circular, the MEO team members essentially "function...as competitors" in the process.<sup>45</sup>

#### D. GAO Treatment of Federal Employees A-76 Challenges Prior to Revised Circular

GAO has heard protests from disappointed offerors since the 1920s.<sup>46</sup> Until 1984, GAO resolved protests based on its statutory authority to settle and adjust accounts.<sup>47</sup> In 1984, CICA provided GAO with express statutory authority to consider protests from disappointed offerors for federal contracts:<sup>48</sup> "The Comptroller General shall decide a protest submitted to the Comptroller General by an interested party."<sup>49</sup> Prior to the 2004 CICA amendment, an "interested party" was "(1) an actual or prospective bidder or offeror whose direct economic interest would be affected by the

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<sup>44</sup> *Federal Prison Indus.*, Comp. Gen. B-290546, 2000 CPD ¶ 112 at 5.

<sup>45</sup> *Department of the Navy - Recon.*, Comp. Gen. B-286194.7, 2000 CPD ¶ 76, at 4.

<sup>46</sup> JOHN CIBINIC & RALPH C. NASH, *FORMATION OF GOVERNMENT CONTRACTS* (3<sup>rd</sup> ed. 1988).

<sup>47</sup> *Id.* at 1492.

<sup>48</sup> 31 U.S.C. §§ 3551-3556 (2004).

<sup>49</sup> *Id.* at § 3553(a).

award of the contract or by failure to award the contract.”<sup>50</sup>

Historically, GAO ruled that federal employees and their unions were not *interested parties* under the statutory definition. Therefore, they lacked standing to challenge the conduct of competition under A-76.<sup>51</sup> Under the prior provisions of CICA and GAO’s own regulations,<sup>52</sup> a protestor had to be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract for the procurement of property or services.<sup>53</sup> If a protestor was not eligible for contract award, the protestor could not be an interested party.<sup>54</sup> To determine if a bid protestor was an interested party, GAO considered a number of factors, including the protestor’s status in

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<sup>50</sup> *Id.* at § 3551(2).

<sup>51</sup> American Fed’n of Gov’t Employees et al; Comp. Gen. B-282904.2, June 7, 2000, 2000 CPD ¶ 87; American Fed’n of Gov’t Employees, Comp. Gen. B-223323, June 18, 1986, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees—Recon., Comp. Gen. B-219590.3, May 6, 1986, 86-1 CPD ¶ 436.

<sup>52</sup> 31 U.S.C. §§ 3551-3556 (2004).

<sup>53</sup> *Id.* at § 3551(2).

<sup>54</sup> See, e.g., ECS Composites, Inc., Comp. Gen. B-235849.2, Jan 3, 1990, 90-1 CPD ¶ 7; Four Winds Servs., Inc., Comp. Gen. B-280714, Aug 28, 1998, 98-2 CPD ¶ 57.

relation to the procurement, the issues raised by the protestor, and the benefit or relief sought by the protestor.<sup>55</sup>

Prior to the revised Circular, in *American Fed'n of Gov't Employees, AFL-CIO v. United States*, GAO held that no individual or entity associated with in-house performance could be considered an offeror for a federal contract.<sup>56</sup> The MEO in-house plan was not an offer under the Circular because, at that time, solicitation responses were limited to private sector offers.<sup>57</sup> In addition, if the in-house entity won the competition, no contract was awarded.<sup>58</sup> "No individual or entity associated with the proposed performance of the required services in-house can be considered an actual or prospective offeror and accordingly the protesters here [federal employees and the unions representing them] cannot be considered 'interested parties' under CICA and our Bid Protest Regulations."<sup>59</sup>

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<sup>55</sup> *Black Hills Refuse Servs.*, B-228470, Feb 16, 1988, 88-1 CPD ¶ 151.

<sup>56</sup> *American Fed'n of Gov't Employees, AFL-CIO et al.*, Comp. Gen. B-282904.2, 2000 CPD ¶ 87 at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *American Fed'n of Gov't Employees, AFL-CIO et al.*, Comp. Gen. 2000 CPD ¶ 87 at 3. *But see*, *Fed. Prison Indus., Inc.*,

E. GAO Treatment of Federal Employee Challenges After  
Revised Circular

GAO rejected the first federal employee challenges to the conduct of competitions filed after the A-76 revisions.<sup>60</sup> In April 2004, GAO determined that it did not have jurisdiction under CICA to hear challenges asserted by federal employees, federal employee unions or agency tender officials.<sup>61</sup> GAO determined that no federal employee or federal employee union can qualify as "interested parties" under CICA, and, therefore, neither has standing to file a protest at GAO.<sup>62</sup> GAO acknowledged the inconsistency in allowing private sector offers, but not federal employee interests, to protest competitive sourcing decisions but stated:

Notwithstanding the May 29, 2003 revisions to the [OMB] Circular A-76, the in-house competitors in public/private competitions conducted under the Circular are not offerors and, therefore, under the current language of the [CICA], no representative of an in-house competitor is an

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Comp. Gen. B-290546, 2002 CPD ¶ 112 at 5. Dep't of the Navy – Recon., B-286194.7, 2002 CPD ¶ 76 at 4.

<sup>60</sup> Dan Duefrene, Comp. Gen. B-293590.2, April 19, 2004, 2004 CPD ¶ 82.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

"interested party" eligible to maintain a protest before the General Accounting Office.<sup>63</sup>

Subsequent to the *Duefrene*<sup>64</sup> decision, the Comptroller General sent letters to Congress<sup>65</sup> recommending CICA amendments to grant federal employees some type of standing to challenge the conduct of A-76 competitions.<sup>66</sup> This letter sparked the current amendments to CICA, fueled in part by complaints lodged by federal employees and their union representatives of a lack of a level playing field in the A-76 process.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Letter from the Comptroller General of the United States, Mr. David M. Walker, to the Honorable Susan M. Collins, Chairman, Committee on Governmental Affairs, United States Senate (April 19, 2004), available at <http://www.gao.gov/decisions/bidpro/2935902.pdf>.

<sup>66</sup> *Id.* ("We believe that a number of policy considerations, including the principles unanimously agreed to by the Commercial Activities Panel, weigh in favor of allowing certain MEO protests with respect to public/private competitions conducted in accordance with OMB's revised Circular A-76....I believe that providing a level playing field in A-76 competitions with regard to protest standing as well as other areas, is key to addressing the widespread lack of trust in the A-76 process".)



### III. IMPACT OF CICA AMENDMENTS ON STAKEHOLDERS

The CICA amendments impacted all the stakeholders in public-private competitions. They were met with varying degrees of acceptance and suspicion by all involved. Specifically, the federal employees and their union representatives distrusted the CICA amendments because they were not granted direct access to the GAO. Industry representatives conversely were displeased because federal employees and their unions were granted additional rights in the bid protest process. Industry tolerated these rights because government employees and unions did not gain direct access to GAO but had to proceed through the agency tender official. The federal government, of course, is largely responsible for implementing these amendments.

#### A. Unions and Industry Comments

Unions were disappointed that the CICA amendments did not provide the unions direct access to GAO on behalf of federal employees.<sup>67</sup> Despite what has been termed a "huge

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<sup>67</sup> Amelia Gruber, *Compromise of Job Competition Protests Gets Mixed Review*, Gov't Exec. Com., (October 12, 2004), at <http://www.govexec.com/dailyfed/1004/101204a1.htm>. ("Senior managers are charged with carrying out the agenda of the sitting president," said John Gage, president of the American Federation of Government Employees. "When it comes to [the] Bush administration's privatization agenda, senior managers do not have the incentive, do not have the

step forward" by some, other stakeholders sharply criticized the legislation.<sup>68</sup> They viewed the outcome as a weakened and ineffective version of appeals rights language sponsored by Senator Susan Collins, R-Maine, and passed in June 2004 as an amendment to the Senate version of the Defense authorization bill.<sup>69</sup> Collins' provision provided that either the agency tender official or a separate official elected by the in-house team members could appeal to GAO.<sup>70</sup> House and Senate negotiators on the fiscal year 2005 defense authorization bill (H.R. 4200), however, dropped Collins' language in the final version of the defense authorization bill.<sup>71</sup>

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autonomy, and do not have the resources to adequately represent the interests of federal employees.")(“The option for elected in-house representatives to file protests is critical because agency tender officials can’t necessarily be trusted to act in the federal employee team’s best interests, union officials said. Dan Duefrene, a National Federation of Employees representative in California, said he is ‘extremely disappointed’ with the compromise language because decisions to file protests remain primarily under management control.”)

<sup>68</sup> *Id.*

<sup>69</sup> S. Amend. 2438, 108<sup>th</sup> Cong. (2004), available at <http://thomas.loc.gov>.

<sup>70</sup> *Id.*

<sup>71</sup> Michael P. Bruno, *Competitive Sourcing, Congress Keeps Streamlined Competitions, Gives ATO Option of Protesting to GAO*, The Bureau of National Affairs, (October 12, 2004), available at

Unions, such as the National Federation of Federal Employees and the American Federation of Government Employees (AFGE), criticized the weakened language because it removed the option for an elected in-house representatives to file protests.<sup>72</sup> Union believed that the agency tender official might not act in the best interests of the federal employees in-house team.<sup>73</sup> Agency tender officials will likely be senior level managers within their respective agencies who, by virtue of their position and status, may lack the inclination to file protests against their own agency.<sup>74</sup> "Senior managers do not have the incentive, do not have the autonomy and do not have the resources to adequately represent the interests of federal employees."<sup>75</sup>

The unions echoed these concerns in written comments to GAO and in testimony before several congressional

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[http://emissary.acq.osd.mil/inst/share.nsf/Streamlined\\_Competitions](http://emissary.acq.osd.mil/inst/share.nsf/Streamlined_Competitions).

<sup>72</sup> Gruber, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> Gruber, *supra* note 67; Angela B. Styles, *Standing to Challenge Public-Private Competitions: Safeguarding Fairness and Integrity*, (unpublished paper funded by American Federation of Government Employees) (on file with author).

<sup>75</sup> Gruber, *supra* note 67.

committees.<sup>76</sup> AFGE, the largest federal sector employee union, submitted written comments in response to GAO's

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<sup>76</sup> *New Century, New Process: A Preview of Competitive Sourcing for the 21<sup>st</sup> Century, Hearing Before the House Government Reform Comm., 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., 108-42 (2003) (statement of Bobby L. Harnage, National President, American Federation of Government Employees):*

While federal service contracting is riddled with inequities against its dedicated in-house workforce, it boggles the mind that federal employees and their union representatives are unable to hold agency officials responsible for their decisions in the same fashion as contractors. Asserting that our interests can be represented by a management official, particularly in the virulently anti-federal employee Bush Administration, is preposterous....The only argument offered against this [federal employees having the same legal standing as their contractor counterparts] clearly meritorious amendment was the fear that federal employees could tie up the court for years. This nightmare scenario bears no relation to reality. Virtually all federal employee litigation would be bid protests to the GAO, which operate under strict schedules. In addition, the federal government can override a stay under the Competition in Contracting Act at any time by finding an 'urgent' need. In court, the federal government can only be stopped from awarding contracts, during a protest, by entry of an injunction. However, those injunctions can be overcome if the federal government argues to the court that it needs expedition.

*See also Hearings on Outsourcing and the Proposed Revisions to OMB Circular A-76 Before the Subcomm. on Readiness of the House Armed Services Comm., 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., (2003)(statement of Jacques Simon, Public Policy Director, American Federation of Government Employees):*

Non-numerical, agency-specific sourcing goals that are truly equitable cannot possibly be created unless both contractors and federal employees have the same rights to challenge agencies' sourcing decisions. Currently, only

request for comments placed in the Federal Register on 13 June 2003.<sup>77</sup>

AFGE recommended that GAO redraft its protest regulations to explicitly provide both the ATO and the union, as the employee representative elected by the majority of directly affected employees, with standing to file protests, and/or intervene, like any other directly affected parties.<sup>78</sup> AFGE also recommended that the ATO and

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contractors have legal standing to take agencies to GAO and the Court of Federal Claims—and not federal employees and their union representatives. It is manifestly unfair that the Administration has unleashed a tidal wave of privatization on federal employees without making sure that federal employees as well as contractors can both have their day in court.

<sup>77</sup> Letter from American Federation of Government Employees, AFL-CIO, to Michael R. Golden, Assistant General Counsel, GAO (July 16, 2003) [hereinafter AFGE Letter], available at <http://www.afge.org>; see also Notice Regarding Standing of In-House Entity, 68 Fed. Reg. 35411-413. GAO solicited comments to regarding two key questions: whether the revisions affected the standing of an in-house entity to file a bid protest at the GAO, and who would have the representational capacity to file such a protest.

<sup>78</sup> AFGE Letter, *supra* note 77 (AFGE recommended that GAO add the following language to 4 C.F.R. § 21.0(a): "In the case of a protest pertaining to an OMB Circular A-76 competition, "interested party" shall include both the ATO and the incumbent union representing the affected federal employees or, if there is no such incumbent union, the representative of the affected federal employees." AFGE also recommended that "[I]ndividual protests filed by said interested parties shall have standing individually. When both the ATO and the union or employee representative have filed individual protests regarding the same A-76 matter,

the union enjoy full rights as interested parties "individually and jointly" under CICA and the related protest regulations.<sup>79</sup> Counsel for the ATO, the union and/or unrepresented employees (if there is no union) should all be full participants as legal representatives for their clients, including having full access to nonpublic information.<sup>80</sup>

It was crucial, in AFGE's estimation, for the federal employees to have a co-equal right to file a protest, and not to have their ability to challenge A-76 competitions tied solely to the decision-making powers of the ATO.<sup>81</sup>

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they shall be considered joint protestors with both individual and joint standing.")

<sup>79</sup> *Id.*

<sup>80</sup> GAO-02-520SP, United States General Accounting Office, GAO, Office of the General Counsel, April 2002, Guide to GAO Protective Orders, *available at* <http://www.gao.gov/decisions/bidpro/bid/d03539sp.pdf>. (Under CICA and GAO's Bid Protest Regulations, a contracting agency is required to provide all relevant documents to GAO and interested parties. These documents often contain a company's proprietary or confidential data or the agency's source selection sensitive information that cannot be released publicly. GAO may issue a protective order to allow limited access to such protected information to attorneys, or consultants retained by attorneys, who meet certain requirements. Only attorneys, or consultants retained by them, who represent an interested party or intervenor may apply for admission to a GAO protective order.)

<sup>81</sup> AFGE Letter, *supra* note 77.

AFGE noted that, although the ATO is independent of the CO, the Source Selection Authority (SSA), the Source Selection Evaluation Board (SSEB), and the Performance Work Statement (PWS) team, the ATO is "on the payroll of the agency and cannot realistically be expected to protest against a decision of his own agency with the self-interested vigor of a CEO or manager of a private contractor."<sup>82</sup>

However, not all the stakeholders were upset with limiting the federal employees' appellate rights to the ATO.<sup>83</sup> Clearly, industry had an interest in keeping federal

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<sup>82</sup> *Id.*

<sup>83</sup> *New Century, New Process: A Preview of Competitive Sourcing for the 21<sup>st</sup> Century, Hearing Before House Government Reform Comm., 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., 108-42 (2003) (Statement of Stan Z. Soloway, President, Professional Services Council):*

Under the new A-76 Circular, we think it is possible that GAO could determine that an agency tender official--the government official authorized to commit the government through its bid and to commit the government to performance as the signatory to the Letter of Obligation--qualifies for standing to protest before the GAO. For the most part, the revised A-76 places on this agency tender official the same rights and responsibilities as shouldered by all other bidders. On the other hand, it is inconceivable to us that the GAO could rule that federal employees, either as individuals or through their elected representative, would be or should be granted such standing. While companies have the standing to protest, their workforce, be they individuals or unions, do not have such standing. Although employees are clearly affected by decisions in the course of a competition, they do

employees from having equal access to GAO to protest aspects of A-76 competitions. Industry voiced lukewarm support for extending protest rights to the ATO, but firmly resisted extending those same rights to federal employees and their unions.<sup>84</sup> Industry do not view this as a matter of equity. Industry representatives assert that federal employees are not the legal equivalent of government contractors and, therefore, should not have the same rights.<sup>85</sup> Further, contractor employees are the legal

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not have the legal or financial liability for the bid submitted or for post-award performance. This is true of individuals and of unions, be they public or private.

<sup>84</sup> Stan Z. Soloway, *Legal Issues Prevent A-76 Appeals by Workers*, FederalTimes.Com., July 21, 2003, available at <http://www.federaltimes.com>. [hereinafter Soloway, *Legal Issues*]; Stan Z. Soloway, *Protesting Too Much*, Gov't Exec. Com., December 22, 2003, available at <http://www.govexec.com/dailyfed/1201/122203ff.htm>. [hereinafter Soloway, *Protesting*]; Letter from the Fair Competition Coalition to Senator Susan Collins (May 13, 2004), at <http://www.faircompetition.org>. [hereinafter Fair Competition Coalition] The Fair Competition Coalition is a broad-based coalition of key industry groups formed to champion a process stressing that the Federal government compete its commercial activities in a manner that is fair, based on generally accepted cost accounting principles, and results in meaningful savings to, and streamlining of, the Federal government with the goal of better serving the taxpayer. The Fair Competition Coalition consists of numerous industry associations.

<sup>85</sup> Soloway, *Legal Issues*, *supra* note 84; Soloway, *Protesting*, *supra* note 84; Fair Competition Coalition, *supra* note 84.



equivalent of federal employees, and these employees have no protest rights. Although private sector employees have rights and remedies for certain grievances in the labor arena, they do not extend into the procurement process.<sup>86</sup> Additionally, neither employees nor their unions assume any of the legal responsibilities that contractors assume by submitting bids or proposals, and by performing under federal contracts.<sup>87</sup>

## B. Federal Government

### *1. Role of the ATO and Legal Representation*

The creation of the ATO position presents tough issues for the federal government. Among the issues requiring resolution are how to provide legal representation for the ATO both during the competition and a potential protest and how to establish firewalls within an agency to allow for competent representation. It is unclear at this point who will serve as an ATO within a federal agency. However, this official will certainly be a senior management level

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<sup>86</sup> Soloway, *Legal Issues*, *supra* note 84; Soloway, *Protesting*, *supra* note 84; Fair Competition Coalition, *supra* note 84.

<sup>87</sup> Soloway, *Legal Issues*, *supra* note 84; Soloway, *Protesting*, *supra* note 84; Fair Competition Coalition, *supra* note 84.

federal employee. The revised Circular defines an ATO as an inherently governmental position with decision-making authority and charges the ATO with a number of responsibilities, in addition to initiating protest actions.<sup>88</sup>

Moreover, an ATO is charged with developing, certifying, and representing the agency tender in an A-76 competition.<sup>89</sup> The revised Circular also charges an agency with ensuring that the ATO has access to available resources such as skilled manpower and funding necessary to develop a competitive agency tender.<sup>90</sup> These resources arguably include effective legal representation. This, however, creates a conflict of interest. Typically, agency

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<sup>88</sup> OMB Circular A-76, *supra* note 20, at attach. B, P A.8.a. ("Agency Tender Official (ATO). The ATO shall (1) be an inherently governmental agency official with decision-making authority; (2) comply with this circular; (3) be independent of the contracting officer (CO), source selection authority (SSA), source selection evaluation board (SSEB), and performance work statement (PWS) team; (4) develop, certify, and represent the agency tender; (5) designate the most efficient organization (MEO) team after public announcement of the standard competition; (6) provide the necessary resources and training to prepare a competitive agency tender; and (7) be a directly interested party. An agency shall ensure that the ATO has access to available resources (e.g., skilled manpower, funding) necessary to develop a competitive agency tender.)

<sup>89</sup> *Id.* at attach. B, P A.8.a.

<sup>90</sup> *Id.*

attorneys assist the contracting officer with the source selection process in an A-76 competition and represent their agencies in protest actions.

The revised Circular demands independence amongst the particular stakeholders.<sup>91</sup> Aside from the ATO, the other stakeholders involved in an A-76 competition (under standard procedures) include the following "competition officials"--the CO, the PWS Team Leader, the Human Resource Advisor (HRA), the source selection authority (SSA) and the SSEB.<sup>92</sup> Each of these officials (aside from the SSEB which is appointed by the SSA) is appointed by the "Competitive Sourcing Official" who is the government official responsible for the implementation of the Circular within the agency.<sup>93</sup> The ATO, then, is appointed by another government official within the agency.<sup>94</sup> The other stakeholders within the A-76 competition include the MEO Team, a group comprised of technical and functional experts

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

formed to assist the ATO in developing the agency tender, and the private sector offerors.<sup>95</sup>

Within the context of an A-76 competition, the ATO is aligned with the MEO Team and HRA in developing the agency tender.<sup>96</sup> The ATO must be independent of the CO, the SSA, the SSEB, and PWS team.<sup>97</sup> The HRA is an agency official and a human resource expert charged with assisting the ATO and the MEO team in developing the agency tender.<sup>98</sup> The HRA, like the ATO, must be independent of the CO, the SSA, PWS team and the SSEB.<sup>99</sup> The ATO, HRA, and MEO team will require their own legal representation to assist in the process of developing the agency tender, and with potentially filing a protest in the event an A-76 competition results in the private sector winning the competition.

Aligned against the ATO team, are the CO, SSA, the SSEB, and PWS team.<sup>100</sup> The CO, SSA, the SSEB members, and

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

PWS team members must be government officials independent of the ATO, HRA, and MEO team. The SSA is essentially responsible for running the A-76 competition for the agency.<sup>101</sup> The CO is responsible for the solicitation and source selection evaluation methodology, and awards the contract or issues an MEO letter of obligation or fee-for-service agreement resulting from a streamlined or standard competition.<sup>102</sup> The PWS team develops the Performance Work Statement, quality assurance surveillance plan and assists the CO in developing the solicitation.<sup>103</sup> The SSA appoints the SSEB and the SSEB assists the SSA in a negotiated procurement conducted under the Circular.<sup>104</sup> The SSA also requires legal representation throughout the source selection process.

The current A-76 process demands that the ATO team be independent of the SSA.<sup>105</sup> To establish this independence, the agency must establish firewalls to separate these teams, including any legal representation for each team.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

This requires, for example, that each team's legal representation have separate supervisory chains. Questions arise as to how to establish these firewalls in the context of very small agencies or components that only have one legal office, with a handful of attorneys for the entire organization; or how to establish these firewalls in large agencies such as the Air Force.<sup>106</sup>

Another crucial issue that faces agencies is determining who will represent the ATO team and the SSA team in an A-76 competition. The representation issue has not been settled. The Department of Defense Office of General Counsel (DOD OGC) indicated:

[T]he agency tender official's (ATO's) representation of the agency tender, during either a source selection or any subsequent administrative or judicial proceeding, is consistent with statute and regulation. Section 205 of title 18, United States Code, prohibits a government employee from prosecuting a claim against the United States, or representing a party in a matter in which the United States is a party or has a direct or substantial interest. That statute, however, includes an exception for an employee who takes such actions in the performance of his or her official duties. The ATO, in representing the agency tender, would fall squarely within that exception.<sup>107</sup>

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<sup>106</sup> Email from Marcia Bachman, Associate General Counsel (Acquisition), Office of the General Counsel, United States Air Force to Major Kerry A. Carlson (November 15, 2004, 17:55:41 EST) (on file with the author).

<sup>107</sup> Department of Defense comments on Proposed Revision to OMB Circular A-76, (January 15, 2003) available at

In the same memorandum, however, DOD OGC raised concerns about the ATO's legal representation. It was not clear to DOD OGC how, or whether, attorneys for an agency could represent both sides in such a circumstance (an A-76 bid protest). OMB's revisions to the Circular raise serious ethical issues of significance to all lawyers in the Executive Branch, and perhaps to the various bar associations that regulate them.<sup>108</sup> Other agencies also questioned the ethical issues raised by having the ATO represent federal employees.<sup>109</sup>

The issues raised by the creation of the ATO position and how to provide competent and unconflicted legal

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[http://www.whitehouse.gov/OMB/circulars/a076/comments/a76\\_list.html](http://www.whitehouse.gov/OMB/circulars/a076/comments/a76_list.html).

<sup>108</sup> *Id.*

<sup>109</sup> Department of Commerce comments on Proposed Revision to OMB Circular A-76, (December 19, 2003), available at [http://www.whitehouse.gov/OMB/circulars/a076/comments/a76\\_list.html](http://www.whitehouse.gov/OMB/circulars/a076/comments/a76_list.html). ("Several areas of conflict are created for agency counsel: (1) a conflict between representation of the Contracting Officer, representation of the ATO, and providing advice to the SSEB during source selection; (2) a conflict between representation of the ATO and advice to the Administrative Appeal Authority (AAA); (3) a conflict between representation of the ATO in any potential GAO protest or Court of Federal Claims proceeding and representation of the CO, SSEB, and AAA.").

representation to both the ATO and the SSA are addressed at length *infra* at Part IV. A. 2.

## 2. *Conflicts of Interest Statute*

ATO representation by agency counsel also raises issues with regard to conflicts of interest. Specifically, some DoD officials question whether an agency counsel can represent an ATO in a protest action against the government without running afoul of the federal conflicts of interest statute, 18 U.S.C. § 205<sup>110</sup> states:

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties--(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim, ...shall be subject to the penalties set forth in section 216 of this title.<sup>111</sup>

Federal employees, therefore, are prohibited from prosecuting claims against the United States, except in the performance of their official duties.<sup>112</sup> While there may be

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<sup>110</sup> 18 U.S.C. § 205 (2002).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



a statutory basis for the ATO's actions in prosecuting a claim against the United States at GAO,<sup>113</sup> there is no similar statutory protection for the agency counsel *representing* the ATO. Therefore, while the ATO may be prosecuting a claim against the United States as part of their official duties, the same may not be said of the agency counsel's actions. There is also concern that the agency counsel's actions in representing the ATO may raise some issues with several state bar associations.

One can argue that an agency counsel's representation of the ATO does not conflict with 18 U.S.C. § 205 because the agency counsel's representation is in the proper discharge of their official duties.<sup>114</sup> While there is no direct reference to the agency counsel's actions in the statutory language, the agency counsel representation of the ATO is a logical extension of the ATO's statutory authority to prosecute claims against the United States, at least at GAO. Agency counsel representation of the ATO in protest actions should qualify, therefore, as being in the proper discharge of their official duties.

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<sup>113</sup> See 31 U.S.C. §§ 3551-3556 (2004).

<sup>114</sup> 18 U.S.C. § 205.

### 3. Federal Acquisition Workforce

The CICA amendments clearly complicate the A-76 process. They will require the federal government to perhaps reshape the manner in which they provide legal representation to agency officials involved in public-private competitions and to pay more attention to issues involving firewalls and organizational conflict of interests. These complications affect a process already overburdened. This does not bode well for the future success of these amendments and the A-76 process. The A-76 process is built on an anemic federal acquisition system ill-prepared to carry out the mandate of these amendments specifically and the A-76 process generally.<sup>115</sup> In the last decade the federal acquisition workforce has been cut down to the core. It is unprepared-lacking both numbers and training-to properly manage A-76 competitions.<sup>116</sup> One

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<sup>115</sup> See generally Steven L. Schooner & Christopher R. Yukins, *Commentary on the Acquisition Workforce*, 47 GOVERNMENT CONTRACTOR ¶ 203 & 204 (May 2005).

<sup>116</sup> Schooner, *supra* note 19, at 282-283:  
The macro (governmentwide) and micro (acquisition workforce) effects of the 1990s downsizing frenzy left the Federal Government woefully unprepared to identify, recruit, and manage the revolutionized workforce that the competitive sourcing initiative envisions. That the competitive sourcing initiative exacerbates a previously existing human capital crisis within the government acquisition workforce is no

result is agencies are routinely forced to acquire contractor support to assist in running competitions. While answering a short-term need, this contractor support creates its own problems.

A recent Department of Defense Office of the Inspector General (DoD IG) Report highlights two specific concerns.<sup>117</sup> DoD uses significant contractor support to supplement its own workforce in conducting A-76 competitions, and the DoD

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secret. But the failure to address the problem prompts a race toward chaos. Specifically, the acute procurement personnel shortages resulted in an accelerating proliferation of poorly structured employee augmentation personal services contracts with inadequate oversight.

See also General Accounting Office, *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges*, GAO-02-630 (2002) at <http://www.gao.gov/new.items/d02630.pdf>; The Acquisition 2005 Task Force, *Final Report: Shaping the Civilian Acquisition Workforce of the Future* (2000) at <http://www.acq.osd.mil/dpap/Docs/report1000.pdf>.

<sup>117</sup> Department of Defense Office of the Inspector General, *Defense Infrastructure, DoD Workforce Employed to Conduct Public-Private Competitions Under the DoD Competitive Sourcing Program (D-2005-028)* [hereinafter DoD IG Report], (February 1, 2005), available at <http://www.dodig.osd.mil/audit/reports>. The DoD Office of the Inspector General performed this audit in response to the requirements of Section 328 of Public Law 108-375, "Ronald Reagan National Defense Authorization Act for Fiscal Year 2005," October 28, 2004, which required the DoD Inspector General to issue a report to Congress addressing whether DoD employs a sufficient number of adequately trained civilian employees to satisfactorily conduct the public-private competitions scheduled by DoD for the next fiscal year, and to administer any resulting contracts.

personnel working on A-76 competitions lack training and experience. The Report sought to determine whether DoD employed a sufficient number of adequately trained civilian employees to satisfactorily conduct the public-private competitions scheduled during the next fiscal year, including a sufficient number of employees to satisfactorily formulate the performance work statements and MEO plans and to administer any resulting contracts.<sup>118</sup> Although the Report did not address the sufficiency of other agencies, bear in mind that the DoD is responsible for the majority of A-76 competitions in the government.<sup>119</sup>

The IG found that DoD "does not maintain a sufficient experienced workforce needed to satisfactorily conduct all the scheduled public-private competitions and uses contractor support to augment its workforce."<sup>120</sup>

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<sup>118</sup> *Id* at 5. (The military departments, defense agencies and DoD field activity reviewed had awarded 10 contracts for competitive sourcing support, totaling \$5,306,500.)

<sup>119</sup> Jacques S. Gansler & William Lucyshyn, *Competitive Sourcing: What Happens to Federal Employees?* IBM Center for the Business of Government (October 2004), available at: <http://www.businessofgovernment.org>.

<sup>120</sup> *Id* at Executive Summary. The Report found that the "DoD competitive sourcing program fluctuated from year-to-year due to various legislative and policy changes and most DoD personnel assigned to work on a public-private competition and only participated in the program after their positions were selected for public-private competition.

Accordingly, DoD used or planned to use contractor support to augment its workforce conducting public-private competition.<sup>121</sup> Contractor support would be used to perform preliminary planning and to develop performance work statements, quality assurance plans, and agency tenders.<sup>122</sup>

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Consequently, maintaining a sufficient number of adequately trained civilian employees to satisfactorily conduct public-private competitions without contractor support would not be an effective use of DoD resources."

<sup>121</sup> *Id.* at 5; see also William Welsh, *Navy to Assess Feasibility of Outsourcing Some Jobs*, Washington Post, (May 23, 2005) (The Navy awarded contracts to seven companies to assist them with determining whether they should outsource some jobs to the private sector or continue to perform them internally. Each of the contracts has a ceiling of \$60 million over a five year period.)

<sup>122</sup> *Id.* at 5; see also Presolicitation Notice, Indefinite Delivery Fixed Price Service Contract for A-76 Consultant Services, (April 4, 2005), U.S. Army Corps of Engineers, Baltimore, available at <http://www.2eps.gov/spg/USA/SynopsisP.html> (In this synopsis for A-76 consultant services, the U.S. Army Corps of Engineers indicated that:

[W]ork will require contractor to provide consultant services and personnel with A-76 expertise to assist with completion of the elements of a standard A-76 competition including Preliminary Planning, Market Research, Data Collection and Analysis, Development of the Performance Work Statement (PWS) and Price Schedules, Development of the Quality Assurance Surveillance Plan (QASP) including metrics and standards needed for the competition. Additionally, the contractor will be required to support the Agency Tender Official (ATO), who will be preparing a proposal for the Most Efficient Organization (MEO). As part of the ATO proposal, areas will include MEO Training Workshop and assistance with completion of a

The Report also found that DoD had not established minimum training standards for competition officials or inexperienced DoD functional and technical experts assigned to work on public-private competitions.<sup>123</sup> DoD personnel lacked experience or adequate training for two reasons. They were only assigned to participate in public-private competitions if they were functional or technical experts in their fields whose positions were scheduled to be competed.<sup>124</sup> In addition, the DoD competitive sourcing program fluctuated from year-to-year due to various legislative changes and policy changes.<sup>125</sup> The Report recognized that agencies are obligated to obtain contractor support to supplement its workforce to conduct public-private competitions *but noted that a highly trained core DoD workforce was essential for overseeing the contractor support and inexperienced DoD personnel.*<sup>126</sup>

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Concept Plan, MEO Plan, Quality Concept Plan, Development of the Agency Cost Estimate, and Preparation of the Agency Tender.

<sup>123</sup> DoD IG Report, *supra* note 117.

<sup>124</sup> *Id.* at 10.

<sup>125</sup> *Id.* at 5. ("The number of public-private competitions DoD announced annually from FY 1995 through FY 2004 ranged from 453 competitions (FY 1999) to 19 competitions (FY 2004").

<sup>126</sup> *Id.* at 13.

The Report noted DoD does not maintain a highly trained core workforce essential for overseeing the contractor support and inexperienced DoD personnel.<sup>127</sup> On February 1, 2001, the Deputy Under Secretary of Defense (Installations) issued a memorandum regarding A-76 Circular training standards and directed DoD components to set minimum training standards for key individuals involved in public-private competitions.<sup>128</sup> Of the DoD components reviewed; only the Army Corps of Engineers and DLA had formally established minimum training standards.<sup>129</sup> In February 2004, DoD reported that the Air Force was developing standardized training on competitive sourcing in conjunction with the Defense Acquisition University; however, these courses are not fully funded.<sup>130</sup> The Report recommended DoD establish standardized training guidelines for DoD competitive sourcing program offices to include functional and technical experts assigned to work on

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 11.

<sup>129</sup> *Id.* at 12. (The Army Corps of Engineers established minimum training standards in its Strategic Sourcing Program Management Plan and DLA established minimum training standards in its *A-76 Competition Guidebook*.)

<sup>130</sup> *Id.*

public-private competitions and to establish minimum training standards for all DoD competition officials.<sup>131</sup>

The lack of a highly trained core workforce essential for overseeing contractor support and DoD personnel further complicates the A-76 process and threatens achievement of the goals of the CICA amendments.<sup>132</sup> If the process used to implement these amendments is flawed, achieving these goals is obviously less certain. If the government is serious about implementing and creating a competitive sourcing process that works, it must ensure that the agencies have

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<sup>131</sup> *Id.* at 14 (In addition, the Report noted that ensuring that the contractor support staff is experienced and adequately trained is also significant to the process. The Report recommended that DoD should include a key personnel clause in its contracts to ensure that the contractor's key personnel does the work under the contract.).

<sup>132</sup> See Schooner & Yukins, *supra* note 115 at 2, ("The relentless competitive sourcing initiative exacerbates the crisis. '[T]he increasing significance of contracting for services has prompted ... a renewed emphasis ... to resolve long-standing problems with service contracts. To do so, the government must face the twin challenges of improving its acquisition of services while simultaneously addressing human capital issues. One cannot be done without the other.' (quoting GAO-01-753T, *Contract Management: Trends and Challenges in Acquiring Services* (May 22, 2001), available at <http://www.gao.gov/new.items/d01753t.pdf>.) Expertise in sealing bidding or supply purchasing is not enough. Competitive sourcing (or, often, replacing Government employees with contractors) requires skilled professionals to plan, compete, award, and manage sophisticated long-term service contracts.").



the necessary personnel. At this time, the government has done little to remedy this problem.

#### 4. *Organizational Conflicts of Interest*

Hiring contractors to support A-76 competitions also raises the risk of creating organizational conflicts of interest (OCIs).<sup>133</sup> Due to the increased consolidation of the defense industry and the fact that the government is buying more services from contractors<sup>134</sup> it is increasingly difficult for contracting officers to mitigate OCIs within

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<sup>133</sup> Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, The George Washington University Law School Public Law and Legal Theory Working Paper No. 127, (2005), available at the Social Science Research Network at: <http://ssrn.com/abstract=665274> ("There is one additional and somewhat unusual context in which protestors have alleged OCIs in A-76 competitions. Agencies, challenged by the perceived complexities of the A-76 process, are hiring consulting firms to help them—to help the federal employees put together their MEO staffing proposal, to help the agency put together the performance work statement defining the scope of the services being competed, and to help the agency evaluate the MEO plan and the private sector proposals. As with in-house employees, there is clearly a risk of an OCI when the same consultant helps the MEO and performs the 'above the fray' tasks of writing the performance work statement and evaluating proposals.")

<sup>134</sup> *Id.* at 2.

the context of an A-76 competition. This add further complicates the management of these competitions.<sup>135</sup>

As the defense industry consolidated, it has become more challenging for contracting officers to resolve all OCIs completely within the context of an A-76 competition. The problem is further heightened with multiple contractors, in addition to the requirements of maintaining firewalls between the two government components-the MEO/ATO team and the SSA/SSEB/CO team.

FAR subpart 9.5 describes an organizational conflict of interest as "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."<sup>136</sup> The FAR directs that contracting officers to

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<sup>135</sup> See Thomas J. Madden, John J. Pavlick, Jr. and James F. Worrall, *Organizational Conflicts of Interest/Edition III*, 94-08 BRIEFING PAPERS I (July 1994); see also Jonathan Karp and Andy Pasztor, *Can Defense Contractors Police Their Rivals Without Conflict?*, WALL ST. J., Dec. 28, 2004, at A1.

<sup>136</sup> Federal Acquisition Regulation ¶ 2.101.

identify and evaluate potential OCIs and resolve them through avoidance, neutralization, or mitigation.<sup>137</sup>

Caselaw has divided OCIs into three groups: biased ground rules, unequal access to information, and impaired objectivity.<sup>138</sup> These situations are not novel. The GAO has previously faced OCIs in the context of A-76 competitions.<sup>139</sup> In an A-76 competition, contracting officers must guard against situations involving biased

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<sup>137</sup> Federal Acquisition Regulation ¶ 9.504.

<sup>138</sup> See *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, Comp. Gen., B-254397 et al., July 27, 1995, 95-2 ¶ CPD 129; see also *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2001); see also Gordon, *supra* note 231, at 7:

Biased ground rules refers to situations where a company sets the ground rules for a future competition by, for example, writing the specifications that competitors for a contract must meet. Unequal access to information arises where a company has access to nonpublic information (typically through performance of a contract) that gives it an unfair advantage in the competition for a later contract. Impaired objectivity comes into play when a company is asked to perform tasks that require objectivity, but another role the company plays casts doubt on the company's ability to be truly objective (for example, where a company is to give the government an assessment of the performance of firms, where one of those firms is an affiliate of the company giving the assessment.

<sup>139</sup> See *DZS/Baker; Morrison Knudsen Corp.*, Comp. Gen., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19; see also *Jones/Hill Joint Venture*, Comp. Gen., B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194.

ground rules and impaired objectivity. Specifically, hiring contractors to assist the contracting officer with preparation of the performance work statement and to assist the SSEB in evaluating proposals implicates potential violations of both biased ground rules and impaired objectivity. Biased ground rules are implicated because contractors in writing the performance work statement are setting the ground rules for the A-76 competition. Impaired objectivity is implicated because the contractor is required to assist the SSEB in evaluating proposals.

#### IV. IMPACT OF CICA AMENDMENTS ON THE GAO

The recent CICA amendments also impact how GAO adjudicates protests, specifically, with regard to protective orders and intervenors.

##### A. Protective Orders

Under CICA, after a protest action is filed, agencies must submit an agency report including relevant documents to GAO and interested parties.<sup>140</sup> Typically, these documents contain a company's proprietary or confidential data or the agency's source selection sensitive information

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<sup>140</sup> 31 U.S.C. § 3553(b)(2); Guide to GAO Protective Orders, *supra* note 80.

that cannot be released publicly. GAO may issue a protective order to allow limited access to such protected information to attorneys, or consultants retained by attorneys, who meet certain requirements.<sup>141</sup> The protective order controls access to protected information and dictates how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest.<sup>142</sup>

Protected information may be disclosed by the parties to GAO, the agency, and other individuals admitted under the protective order. Only attorneys, or consultants retained by them, who represent an interested party or intervenor may apply for admission to a GAO protective order.<sup>143</sup> Applicants must establish that they are not involved in competitive decision-making for any company that could gain a competitive advantage from access to protected information, and that there will be no

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<sup>141</sup> 31 U.S.C. § 3553(f)(2); GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80.

<sup>142</sup> GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80.

<sup>143</sup> *Id.* (Protected material may be disclosed to support staff who are employed or supervised by individuals admitted under the protective order and who are not involved in competitive decision-making.)

significant risk of inadvertent disclosure of protected information.<sup>144</sup>

#### *1. Protective Orders and Representation of the ATO*

Presently, agency attorneys need not apply for admission to a GAO protective order to gain access to protected information. Agency attorneys are already required to comply with the disclosure requirements of the Federal Trade Secrets Act.<sup>145</sup> CICA amendments, however, raise the issue of whether GAO should continue to extend this blanket exemption to agency attorneys who represent ATOs in a protest action.<sup>146</sup> A number of commentators petitioned GAO to require that an agency attorney representing an ATO apply for admission under a protective order.<sup>147</sup> This makes sense because federal employees involved in preparing the agency tender are effectively functioning as competitors.

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<sup>144</sup> U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984); 4 C.F.R. § 21.4.

<sup>145</sup> 18 U.S.C. § 205.

<sup>146</sup> 31 U.S.C. §§ 3551-3556 (2004).

<sup>147</sup> Comments to Proposed Amendments to Bid Protest Regulations, available at <http://www.gao.gov/decisions/publiccomments.pdf>.

In a protest action involving a standard A-76 competition an ATO would be entitled to status as an "interested party."<sup>148</sup> Normally, counsel to an interested party must apply to be admitted under a protective order. Therefore, agency counsel to the ATO should also apply to be admitted under a protective order. Specifically, the DOD OGC advised that:

[T]he revisions to the Circular A-76 reflect OMB's adherence to the rule governing competitive procurement in the Federal Acquisition Regulation. Safeguards against inadvertent disclosure of protected information, by attorneys for all competitors before GAO, will reinforce the integrity of the competitive process. GAO should consider whether a government attorney is involved in competitive decision-making, as it does in reviewing applications from attorneys in the private bar, and should deny admission in those cases because of the risk of inadvertent disclosure of sensitive information.<sup>149</sup>

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<sup>148</sup> 31 U.S.C. §§ 3551-3556.

<sup>149</sup> Comments to Proposed Amendments, *supra* note 147. (In order to enforce protective orders in a manner that will allow an agency to provide legal representation both to the contracting officer and ATO, DoD OGC cautioned GAO to tailor protective orders to apply to particular government attorneys, and not to disqualify entire offices of general counsel from further involvement in competitive decision-making on the agency tender official's behalf.)

The Navy OGC also agreed that agency attorneys advising the ATO should not receive a blanket exemption but should apply to be admitted to the protective order.<sup>150</sup>

These commentators encouraged GAO to apply the same rules as it does in reviewing applications from the private bar.<sup>151</sup> Specifically, GAO must examine whether the agency attorney is involved in "competitive decision-making."<sup>152</sup> "Competitive decision-making" is defined as: "[A] counsel's activities, associations, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor."<sup>153</sup>

The admission of counsel is made on a case-by-case basis.<sup>154</sup> An attorney's status as in-house counsel, for example, is not dispositive of whether that attorney is

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<sup>150</sup> *Id.*

<sup>151</sup> GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80.

<sup>152</sup> *Id.*

<sup>153</sup> *U.S. Steel Corp.*, 730 F.2d at 1468.

<sup>154</sup> GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80. (Outside counsel and in-house counsel are eligible for admission to a GAO protective order.)



involved in competitive decision-making.<sup>155</sup> In examining the application of in-house counsel to protective orders, GAO considers whether the in-house counsel advise on pricing and product design decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decision-making, and the degree and level of supervision to which in-house counsel is subject.<sup>156</sup>

GAO considers not only the applicant's role with respect to competition in federal government business, but also the individual's role in the commercial marketplace and in relation to other business activities where corporate decisions are made in light of information about competitors that might be discussed under a protective order.<sup>157</sup>

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<sup>155</sup> Allied-Signal Aerospace Co., Comp. Gen. B-250822.2, Feb. 19, 1993, 93-1 CPD ¶ 201; Leboeuf, Lamb, Greene & MacRae, Comp. Gen. B-283825, B-2283825.3, Feb. 3, 2000, 2000 CPD ¶ 35. (The Federal Circuit rejected the assertion that a lawyer should be denied access to the information disclosed under a protective order based solely on his or her position as in-house counsel. The court determined that a *per se* ban on access to confidential information was inappropriate since denial of access cannot rest on the general assumption that one group of lawyers is more or less likely to inadvertently breach its duty under a protective order.)

<sup>156</sup> GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80.

<sup>157</sup> *Id.*

Admission of in-house counsel to a protective order was denied in *McDonnell Douglas Corp.*, where, in balancing the need to protect the confidentiality of sensitive information with the party's need to have access to the information to pursue the protest, GAO found that there was an unacceptable risk of inadvertent disclosure because the in-house counsel advised his company's competitive strategists and there was no showing that the in-house counsel needed access to the information to help the party pursue its protest.<sup>158</sup> In this case, the in-house counsel advised competitive strategists for the procurement at hand on a number of solicitation provisions, including the provisions in the solicitation that sought the offerors' creative approaches and strategies for the streamlining of the acquisition.

In *Robbins-Goia, Inc.*, GAO admitted in-house counsel where the record established that the attorney did not participate in competitive decision-making; the fact that the attorney reported to a competitive decision-maker did not demonstrate alone that there was an unacceptable risk

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<sup>158</sup> *McDonnell Douglas Corp.*, Comp. Gen. B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51; see also *Robbins-Goia, Inc.*, Comp. Gen. B-274318 et al., Dec. 4, 1996, 96-2 CPD ¶ 222; *US Sprint Communications Co. Ltd. Partnership*, Comp. Gen. B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

of inadvertent disclosure of protected material.<sup>159</sup> In *US Sprint Communications Co. Ltd. Partnership*, GAO also granted access to an in-house counsel who established that they worked in the litigation section of the company and the litigation section was a separate and distinct operation devoted exclusively to litigation and was "walled off" from competitive decision-making.<sup>160</sup> In that case, the litigation section was on a separate floor from the corporate counsel and had a secure file room requiring key card access.<sup>161</sup>

## *2. Resolving Protective Order Issues*

If federal agencies utilize agency attorneys to advise ATOs during the A-76 competition, it may be difficult for these agency attorneys to qualify to be admitted under the protective order due to their possible involvement in "competitive decision-making."<sup>162</sup> In their representation of the ATO, it is highly probable that agency attorneys

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<sup>159</sup> *Robbins-Goia, Inc., Comp. Gen. B-274318 et al., Dec. 4, 1996, 96-2 CPD ¶ 222.*

<sup>160</sup> *US Sprint Communications Co. Ltd. Partnership, Comp. Gen. B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.*

<sup>161</sup> *Id.* at 3.

<sup>162</sup> *Id.*

will advise the ATO on strategic decisions with regard to the preparation of the agency tender--the equivalent of the private contractor's proposal or bid. One is hard-pressed not to define such advice as being involved in "competitive decision-making."<sup>163</sup> As the ATO's legal advisor, this agency attorney will advise on myriad subjects, including contract law, source selection, conflicts of interest, and fiscal law. Although some parties have advocated that agency attorneys may be admitted to a protective order so long as the agency implements sufficient procedures to ensure the agency attorney cannot subsequently take part in advising the ATO during a re-competition of the function under study<sup>164</sup>--this ignores the reality of the federal government and its utilization of its workforce. If an agency attorney advises an ATO and then proceeds to be admitted to a protective order during a protest, this agency attorney will likely also be advising the ATO on a subsequent re-competition, if, for example, GAO recommends a re-competition of the activity. The risk of inadvertent disclosure is too high in this situation where the ATO's attorney would have had exposure to a competitor's

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<sup>163</sup> *Id.*

<sup>164</sup> Comments to Proposed Amendments, *supra* note 147.

protected information, and now is advising the ATO on the best strategy for the re-competition.

In *McDonnell Douglas Corp.*, the GAO denied admission to a protective order to an in-house counsel who advised his company's competitive strategists and who did not require access to the information to help the party pursue its protest.<sup>165</sup> Agency counsel representing an ATO in an A-76 competition may find themselves in a similar dilemma. They will advise the ATO as the MEO's "competitive strategist." ATO counsel will not only have regular contact with those involved in competitive decision-making, but will also advise technical and contracting personnel (in addition to the ATO) on all aspects of the A-76 competition. Like it did regarding the in-house counsel in *McDonnell Douglas Corp.*, GAO may likely find that if an ATO counsel is given access to protected information, "he would need to be continuously aware of, and to mentally compartmentalize, the potentially relevant information that would be non-disclosable to his colleagues whenever asked for advice."<sup>166</sup>

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<sup>165</sup> *McDonnell Douglas Corp.*, Comp. Gen. B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51.

<sup>166</sup> *Id.* at 4.

The difficulty that agency representation of the ATO raises with regard to protective orders can be resolved if agencies provide separate attorneys to represent the ATO—one attorney for the preparation of the agency tender and A-76 competition, and a second attorney for any possible protest that may flow from this competition. Similar to private contractors often forced to retain outside counsel to represent them in protest actions due to the restrictions of the protective order, agencies may be forced to provide two different counsel for the ATO—an “in-house” agency counsel for the competition and “outside” counsel for litigation. The “in-house” counsel may so firmly entrenched in “competitive decision-making” to make it impossible for the same agency counsel to represent the ATO in possible litigation at GAO.

In order for agencies to provide effective legal representation of the ATO for both the A-76 competition and any subsequent litigation, they must also establish effective firewalls between these attorneys. Effective firewalls should include not only physical separation of offices, but also separate chains of command/authority. Effective firewalls are required to ensure that there is little risk of inadvertent disclosure of protected

information.<sup>167</sup> As it did with the in-house counsel in *US Sprint Communications Co. Ltd. Partnerships*, GAO will likely approve the admission of agency counsel to a protective order when they can establish that they work in a separate and distinct office devoted exclusively to litigation and that is "walled off" from competitive decision-making.<sup>168</sup> In addition, it would further agency counsels' application if they certify that they give legal advice only on litigation matters, and do not give advice on decisions relating to competitive structuring or review of proposals and bids.<sup>169</sup>

It may be beneficial for agencies to centralize their litigation departments (if this has not already occurred) and allow field attorneys to represent the ATO at a particular location if the activity subject to the A-76 competition and the field attorney are co-located. There will be at least a physical separation of the functions of legal representation. Agencies must also take precautions to provide separate reporting chains for the field attorney representing the ATO and the agency litigation unit. If an

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<sup>167</sup> *Id.*

<sup>168</sup> *US Sprint Communications Co. Ltd. Partnership*, Comp. Gen. B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

<sup>169</sup> *Id.*

A-76 competition involves an activity located at several different locations, it is likely that the agency will utilize attorneys located at a central headquarters/office to both represent the ATO during the competition itself and any subsequent litigation. If this occurs, an agency must take precautions to "wall-off" one group of attorneys from the others in order to prevent inadvertent disclosure of protected information. Such measures should involve some type of physical separation of personnel and separate reporting/command chains. While this repositioning of personnel is easier to implement for larger agencies such as those within the Department of Defense, other smaller agencies may find it challenging to establish such firewalls. Such agencies may choose to use other agency's counsel for the limited purpose of representing the ATO or also retain outside counsel to represent the ATO during protest actions. The Federal Aviation Administration, for example, hired a private attorney to represent the ATO in its most recent A-76 competition, the Public-Private Standard Competition for the FAA's Automated Flight Service Station service.<sup>170</sup> The decision to hire private counsel

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<sup>170</sup> Amelia Gruber, *Legal Battle over FAA Outsourcing Decision Begins*, Gov't Exec.Com., (March 15, 2005) at <http://gov.exec.com/dailyfed/>



raises its own set of issues of accountability and the intrusion of private interests into public governance which will not be addressed in this paper but deserve further research.<sup>171</sup>

The decision to have agency counsel apply to be admitted under a protective order will also force agencies, and more specifically, senior government officials, to face some of the issues that private sector leaders have faced for some time with regard to the lack of information they will receive regarding the conduct of litigation at GAO, due to the confidentiality restrictions of the protective order. Protective orders impair the amount of information that counsel are allowed to share with their clients. While this situation is somewhat awkward in the context of private bar attorneys representing government contractors, it is accepted by all involved as an important part of the process in that it safeguards proprietary information. It will be interesting to examine future situations involving senior government officials who serve as ATOs who will soon find themselves in the same unenviable position as

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<sup>171</sup> Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13 (2003); Jody Freeman, *The Contracting State*, 28 FLA. ST. U.L. REV. 155, 172 (2000); William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399 (1998).

government contractors. Unlike government contractors, however, a government official's frustration at not being fully informed is not tempered by the knowledge that the requirement of confidentiality protects their proprietary information as well. Senior government officials serving as ATOs must resist the impulse to demand full disclosure, and agency counsel will have to steel themselves against satisfying any such requests. This may prove to be more difficult.

Agency counsel are not as well practiced in the restrictions of confidentiality as are private bar attorneys and typically have a more familiar and involved relationship with their "clients" by virtue of the fact that they often work side-by-side with these officials for years at a time. Unlike private bar attorneys but like in-house counsel, agency counsel may be co-located and work with these officials often on a day-to day basis in close quarters. The concept of "risk of inadvertent disclosure" is especially revealing in this context. While agency counsel representing an ATO for the purpose of a protest may be physically separate from the ATO, it is also extremely possible that these attorneys will be co-located with that official. The risk of inadvertent disclosure is higher in these circumstances. Agencies must be careful to

provide strict guidance to agency counsel who represent an ATO during protest litigation as regards the restrictions of the protective order to guard against the risk of inadvertent disclosure of protected information.

#### B. Intervenor-Employee Representative Issues

Another key issue raised by the CICA amendments regards the qualification of "a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition" to intervene in certain protests.<sup>172</sup> GAO's final rules adopted the CICA language, but GAO set forth no criteria by which to identify that person.<sup>173</sup> Stakeholders differed on GAO's silence.<sup>174</sup> The DOD OGC approved of the lack of criteria:

[T]o the extent that the agency concerned has established such criteria, or has identified the employees' representative in reviewing a contest under Circular A-76, we believe that GAO should defer to the agency's determination. This will reduce the risk that a person whom the agency has deemed to be the employees' representative, for purposes of filing a contest, will be

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<sup>172</sup> See 31 U.S.C. §§ 3551-3556.

<sup>173</sup> Notice of Final Rule to Bid Protest Regulations, 70 Fed. Reg. 19679 (April 14, 2005).

<sup>174</sup> Comments to GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

disqualified by GAO from intervening in a protest.<sup>175</sup>

Industry representatives, such as the Professional Services Council, advocated that GAO should establish procedural guidance for determining who qualifies as an intervenor.<sup>176</sup> In addition, unions asserted that GAO should

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<sup>175</sup> Department of Defense Office of General Counsel Comments (February 18, 2005), GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>176</sup> Professional Services Council Comments (February 18, 2005), GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

Since the standing of an intervenor as the person representing a majority of the affected workforce in a covered A-76 study is jurisdictional to GAO's authority, GAO must establish some procedural standards for determining who qualifies as an intervenor. The statute provides no such guidance. In a bid protest case presented to GAO last year (Dan Duefrene, et al., B-293590.2, et. al., April 19, 2004.) this element was not an issue since the protestor provided to the agency as part of its administrative challenge and the GAO as part of its protest contemporaneously signed statements from an overwhelming number of the affected workforce designating Mr. Duefrene as their *representative* for purposes of the agency challenge and protest. Future cases may not be so clear-cut as to timing of the designation, the percentage of the affected workforce making the designation, or the certainty of the individual selected as the representative. All parties to the protest are entitled to know that only *interested parties* will be able to participate in the proceedings. All parties to the protest are also entitled to know their respective rights and

automatically deem the head of a federal labor organization representing a majority of the employees of the agency "engaged in the performance of the activity or function subject to the public-private competition" to be the employee representative.<sup>177</sup> Unions also noted that without guidance from GAO, agencies will be free to establish their own rules regarding the determination of who qualifies to be an intervenor in a GAO protest.<sup>178</sup> This could lead to inconsistent results-with unions receiving recognition as an intervenor in some protest actions and not receiving recognition in other actions.

Specifically, unions echo that GAO should adopt guidance that indicates that unions certified under 5 U.S.C. § 7111 should receive recognition as the exclusive

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responsibilities during and after a protest proceeding, including whether coverage under a protective order is warranted and available.

<sup>177</sup> National Treasury Employees Union Comments (February 18, 2005); American Federation of Government Employees Comments (February 18, 2005); National Federation of Federal Employees Comments (February 16, 2005), GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>178</sup> National Treasury Employees Union Comments, *supra* note 178; American Federation of Government Employees Comments, *supra* note 178; National Federation of Federal Employees Comments, *supra* note 178, GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

representative of the affected federal employees, if a labor organization represents a majority of the affected federal employees.<sup>179</sup> "Where there is a certified representative in a unit or units impacted by an agency decision to outsource, any suggestion that the employee representative can be a person other than the certified labor organization's designee inappropriately disregards the statutory selection process already in place."<sup>180</sup> Title

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<sup>179</sup> National Treasury Employees Union Comments, *supra* note 178; American Federation of Government Employees Comments, *supra* note 178; National Federation of Federal Employees Comments, *supra* note 178; GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>180</sup> National Treasury Employees Union Comments, *supra* note 178, GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf> :

Title 5 U.S.C. § 7111 compels a Federal agency to "accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election." The petition for such certification and any ensuing election is overseen by the FLRA, which is charged with the supervision and conduct of "elections to determine whether a labor organization has been selected as an exclusive representative by a majority of employees in an appropriate unit." Under this authority, the FLRA certifies a labor organization as the exclusive representative upon determination that the election conducted under its jurisdiction is full and fair....Once certified by the FLRA, each labor organization is held to the same high standard of representation and

5 U.S.C. § 7111 requires that an agency "accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election."<sup>181</sup> Unions recommend that if no labor organization represents a majority of the affected federal employees, that GAO should create uniform procedures for identifying the person who may intervene on their behalf.<sup>182</sup>

Given the short timeline involved in a GAO protest action<sup>183</sup> it is imperative that the determination of who

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tasked with the legal responsibility of "representing all employees in the unit without discrimination and without regard to labor organization membership. Deviations from this objective standard are investigated and adjudicated by the FLRA. No other process of determining majority designation by Federal employees within the Federal agencies can be compared in the thoroughness, detailed procedure, and checks and balances developed by the FLRA's over the last twenty-seven years.

<sup>181</sup> 5 U.S.C. § 7111(a). The Federal Labor Relations Authority is charged with monitoring these elections and certifying that labor organizations have been selected as the exclusive representative by a majority of the employees in an appropriate unit.

<sup>182</sup> National Treasury Employees Union Comments, *supra* note 178.

<sup>183</sup> 4 C.F.R. § 21.1(a)(2) (Requiring protests to be filed within 10 days of when the basis for the protest becomes known or should have been known.).

qualifies for intervenor status be identified before the filing of any future protest action. Because unions certified under 5 U.S.C. § 7111 are already established representatives of a majority of federal employees, no time will be lost in determining who should qualify as their representative.<sup>184</sup>

At the very least, GAO must adopt uniform guidance with regard to who qualifies for intervenor status in a protest action rather than defer to the agency's determination. As correctly noted by unions, allowing each agency to adopt its own guidance will likely lead to inconsistent results. It is GAO's responsibility to establish such guidance and not to abdicate this responsibility to agencies.<sup>185</sup> In addition, by establishing

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<sup>184</sup> 5 U.S.C. § 7111.

<sup>185</sup> See generally Memorandum from David Safavian, Administrator, Office of Management and Budget, to Agency Competitive Sourcing Officials (March 23, 2005) available at [http://www.whitehouse.gov/omb/procurement/comp\\_src/directly\\_interested\\_party\\_memo.pdf](http://www.whitehouse.gov/omb/procurement/comp_src/directly_interested_party_memo.pdf). (In response to requests for clarification from several agencies, the OMB clarified the term "directly interested party" as defined in Appendix D of A-76 Circular. Requests for clarification focused on which individuals may be appointed by directly affected employees to serve as their agent in the pursuit of an administrative contest under the Circular. With regard to these requests, OMB clarified that "the individual appointed by a majority of the directly affected employees - i.e., the named agent - is to be one of the directly affected employees." OMB indicated that this person could



clear guidelines GAO will avoid confusion and possible litigation over the identity of the employee representative. In its Notice of Final Rule, GAO noted "it is not possible to anticipate the variety of factual circumstances in which requests to intervene by either ATOs or employee representatives, or both will occur and, therefore, it is not yet appropriate to set forth standards for how those situations for how those situations will be resolved."<sup>186</sup> It may be even more foolish, however, to proceed on a case-by-case basis in establishing standards by which to identify the employee representative taking into consideration the time constraints of GAO protests.<sup>187</sup>

#### *1. Employee Representative Access to Information*

The CICA amendments also raise issues involving intervenor access to proprietary information. It remains to be seen how employee representatives will interact with ATOs and their legal representatives with regard to proprietary information. There are questions, for example,

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seek legal or other assistance in representing the directly affected employees who was not part of this group-from the employees' union for example.)

<sup>186</sup> Notice of Final Rule, *supra* note 174.

<sup>187</sup> 4 C.F.R. § 21.1(a)(2).

regarding whether an ATO counsel is required to share proprietary information with this representative and their counsel.

The Navy recommended GAO amend its regulations to clarify that the ATO counsel need not share proprietary information with the employee representative.<sup>188</sup> The unions, on the other hand, recommended the employee representative should enjoy equal access to any information received by the ATO and counsel in order to be able to make an informed decision regarding making a request to the ATO to file a protest.<sup>189</sup> In order to make an informed decision, the unions advocated that the employee representative needs access to information from, and the right to participate in, debriefings given to the ATO/MEO team.<sup>190</sup> Such access is "the only way that this new statutory right can be exercised in any meaningful way."<sup>191</sup>

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<sup>188</sup> Department of the Navy Comments (February 18, 2005), GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>189</sup> National Treasury Employees Union Comments, *supra* note 178; American Federation of Government Employees Comments, *supra* note 178; National Federation of Federal Employees Comments, *supra* note 178, GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>190</sup> National Treasury Employees Union Comments, *supra* note 178; American Federation of Government Employees Comments, *supra* note 178; National Federation of Federal Employees

The Professional Services Council recommended GAO should treat the employee representative in the same manner as any other interested party seeking access to protected information and to deny access to anyone with "competitive decision-making" duties.<sup>192</sup> This standard should also apply to the counsel for the employee representative.<sup>193</sup>

As an interested party, the employee representative should have access to the information presented at the ATO/MEO debriefing and therefore, should be present at this debriefing. The employee representative has a separate statutory role independent of the ATO's obligations in this process. In order to make an informed decision regarding whether to request that the ATO file a bid protest on the federal employees' behalf, the employee representative

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Comments, *supra* note 178, GAO Notice of Amendment to Bid Protest Regulations, *available at* <http://www.gao.gov/decisions/publiccomments.pdf>.

<sup>191</sup> National Treasury Employees Union Comments, *supra* note 174.

<sup>192</sup> Professional Services Council Comments, *supra* note 177.

<sup>193</sup> *Id.* (The Professional Services Council comments noted that "[N]othing in the CICA amendments or any other act lowered the or changed the standards for access to protected information, and we do not believe GAO should create any new standard simply because the additional party that may qualify as an intervenor is a federal employee or an outside designated representative of the federal workforce.")

requires access to the information presented at any debriefing. Information received at a debriefing should not contain proprietary information.<sup>194</sup>

As far as access to information filed after the bid protest, employee representatives should be required to apply to be admitted to a protective order and satisfy the standards applied to all interested parties with regard to being involved in "competitive decision-making."<sup>195</sup>

#### V. STANDING FOR ATO AT THE COURT OF FEDERAL CLAIMS?

It remains to be seen whether the ATO will have standing at the Court of Federal Claims (COFC) to file an action challenging an agency's conduct under A-76. While the CICA amendments do not confer standing to ATOs to file

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<sup>194</sup> FAR 15.506(d)(6)(e) (The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. § 552) including - (1) trade secrets; (2) privileged or confidential manufacturing processes and techniques; (3) commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and (4) the names of individuals providing reference information about an offeror's past performance.)

<sup>195</sup> GAO-02-520SP Guide to GAO Protective Orders, *supra* note 80.

such actions at COFC; they do not prohibit such actions.<sup>196</sup>

An ATO may have standing to file a protest at COFC based on the fact that GAO's and COFC's concept of standing has now merged.<sup>197</sup>

#### A. Standing at the Court of Federal Claims

The COFC is currently the exclusive judicial forum for protests.<sup>198</sup> In passing the Administrative Dispute

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<sup>196</sup> 31 U.S.C. §§ 3551-3556 (2004).

<sup>197</sup> See *American Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed.Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

<sup>198</sup> Administrative Dispute Resolution Act, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874-75 (1996) (codified at 28 U.S.C. § 1491(b)). The Administrative Dispute Resolution Act of 1996 expanded the jurisdiction of the Court of Federal Claims by granting the court jurisdiction and broad remedial powers over both preaward and postaward protests. 28 U.S.C. § 1491(b) states:

(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether a suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

Resolution Act (ADRA), Congress amended the Tucker Act to grant the district courts and the COFC concurrent jurisdiction over protests and required each court to follow the Administrative Procedure Act (APA) standard of review.<sup>199</sup>

Under the ADRA, the COFC has jurisdiction "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency."<sup>200</sup> The ADRA, however, does not define the term "interested party."<sup>201</sup> The absence of any controlling language in the ADRA for the term "interested party" created a conflict within the COFC and the Federal Circuit as to whether the ADRA adopted the more liberal Administrative Procedure Act (APA) standing requirement or the more restrictive definition of "interested party" contained in CICA. For some time, the COFC interpreted the term in both ways. In some instances,

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(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."

<sup>199</sup> 28 U.S.C. § 1491(b)(1), (4) (2000) (subjecting review to the standards set forth in 5 U.S.C. § 706 (2000)).

<sup>200</sup> 28 U.S.C. § 1491(b)(1).

<sup>201</sup> *Id.*

the COFC interpreted the term to include any party that would have standing under the APA.<sup>202</sup> Any party that satisfied the APA's requirement for standing, specifically, "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" could challenge an agency decision in federal court.<sup>203</sup> In other ADRA cases, the COFC interpreted the term "interested party" in

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<sup>202</sup> Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, (2003); See e.g., *American Fed'n of Gov't Employees, AFL-CIO v. United States*, 46 Fed. Cl. 586, 595 (2000), *aff'd on alternate grounds*, 258 F.3d 1294 (Fed.Cir.2001); *ATA Defense Indus. v. United States*, 38 Fed. Cl. 489, 494 (1997):

The definition of 'interested party' in Section 3551(2) [applicable to the GAO] arguably is more narrow than the definition that would flow from the application of the plain meaning of Section 1491(b) [applicable to the COFC/district courts]. A party reasonably could be deemed to be interested in the award of a contract even if the party is not an actual or prospective bidder. For example, a subcontractor of a bidder on a contract would have an economic interest in the contract award and therefore would be an 'interested party' even though the subcontractor is neither an actual nor prospective bidder. It is not necessary, however, for this court to resolve whether Congress intended the term 'interested party' to be defined as set forth in other statutes because, although certainly not an 'actual' bidder, plaintiff was a 'prospective bidder of the contract.' Hence, plaintiff would qualify as an 'interested party' even under the definition set forth in Section 3551(2).

<sup>203</sup> 5 U.S.C. § 702 (1994).

relationship to the standing requirements of CICA and adopted the CICA definition of "interested party."<sup>204</sup>

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<sup>204</sup> See e.g. *Redland Genstar, Inc. v. United States*, 39 Fed. Cl. 220, 240 n.5 (1997)(looking to the definition of "interested party" as provided in 31 U.S.C. § 3551 for guidance on interpreting 28 U.S.C. § 1491.) (CICA defined "interested party" to mean "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."); see also *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 778-779 (1997):

The decision by the Congress when it drafted 28 U.S.C.A. § 1491(b)(1) to reference 5 U.S.C. § 706 of the APA, but not the APA standing requirements in 5 U.S.C. § 702, while at the same time to explicitly include the term 'interested party' (the standing requirement used in the GAO protest legislation), appears to the court to be significant on the question of how to determine the definition of 'interested party' for post-award bid protest cases filed in this court. In GAO parlance, the term "interested party" can be considered a term of art. Plaintiff, however, proposes that the term 'interested party' have one meaning when a contractor protests to the GAO, and another when it protests before this court. Such a definitional scheme is not per se impossible. If Congress had expressed an intention to have the same words defined differently in different fora, that would be within the prerogative of the Congress, and the courts would carry out that Congressional intent. However, in the absence of evidence of a Congressional intent to deviate from the settled use and interpretation of a term of art, the effect of which would be to potentially expand significantly the population of protestors, this court is reluctant to embrace the proposed regime of dual definitions. In the absence of a contrary indication, the court finds it appropriate to conclude that Congress intended the amendments in 28 U.S.C.A § 1491(b)(1) to follow the established, or term of art, meaning of 'interested party' as defined by the Congress



The Court of Appeals for the Federal Circuit finally established the federal courts' definition of the term "interested party" in *American Fed'n of Gov't Employees, AFL-CIO v. United States* by adopting the CICA definition of "interested party."<sup>205</sup> The Federal Circuit noted that because Congress used the same term "interested party" in the ADRA as it did in CICA, Congress intended the standing requirements of CICA to apply to the standing requirements for actions brought in federal court under the ADRA.<sup>206</sup>

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in the GAO statute, and as reaffirmed by the Congress just six months prior to the enactment of the amendments to 28 U.S.C.A § 1491(b)(1).

<sup>205</sup> *American Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

<sup>206</sup> 258 F.3d at 1302. (The Court noted that the plain language of the ADRA did not resolve the issue as to whether the CICA definition or the APA definition of standing should apply; it therefore moved to examine the legislative history of the ADRA. In the legislative history of the ADRA, one of the proponents of the legislation described the provision as "expanding the bid protest jurisdiction of the Court of Federal Claims" and that Congress intended by the ADRA that "each court system [the district courts and the COFC] would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system." While the legislative history of the ADRA would appear to point to the conclusion that the COFC would adopt the broader APA standing requirements, the Federal Circuit noted that the "vast majority" of cases brought in the district courts "were brought by disappointed bidders" and that "Congress may have intended the court to exercise jurisdiction over disputes brought by disappointed bidders." The Court also noted that while Congress intended to confer on the COFC

## B. The ATO at Court of Federal Claims?

With the Federal Circuit's adoption of CICA's definition of "interested party", it appears that the COFC's and GAO's standing requirements have now merged. Taking into consideration the ATO is now an "interested party" under CICA, an issue arises as to whether the COFC will follow GAO's lead and grant standing to the ATO to file an action challenging the conduct of competitions under A-76.

Raising the issue of allowing the ATO to challenge an agency's action in federal court implicates the unitary

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jurisdiction previously exercised only by district courts under *Scanwell*, the Court questioned what Congress meant when it referred to "Scanwell jurisdiction." The central focus of the Court's analysis was if "Scanwell jurisdiction" was to include only complaints brought by disappointed bidders or intended for the COFC to have jurisdiction over any contract dispute that could be brought under the APA. The Court interpreted the references in the legislative history to "Scanwell jurisdiction" of the district courts as referencing the district courts' jurisdiction over bid protests brought under the APA by disappointed bidders. The Court indicated the ADRA legislative history suggested that standing under the ADRA was limited to disappointed bidders. Finally, the Court noted that the language Congress used in the statute -- "interested party"--is the same term used in CICA. Based on their analysis, the Federal Circuit held that the term "interested party" under § 1491(b)(1) is limited to the CICA definition of actual or constructive bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract.)

executive theory and "case or controversy" justiciability requirements.<sup>207</sup> The unitary executive theory holds that Article II of the Constitution creates a unitary executive branch headed by the President, alone responsible for its activities.<sup>208</sup> The theory also holds that the Executive branch should resolve all disputes among or within federal agencies. Based on the unitary executive theory, the Department of Justice (DoJ) limits litigation between federal agencies.<sup>209</sup> Under federal law, DoJ litigates the cases in which the United States is a party and generally controls what cases will be filed on behalf of the United States.<sup>210</sup>

Article III of the Constitution limits the judicial power to cases and controversies.<sup>211</sup> The Supreme Court has

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<sup>207</sup> See generally Michael Herz, *United States v. United States, When Can the Federal Government Sue Itself*, 32 WM. & MARY L. REV. 893 (Summer 1991); Lisa M. Schenck, *Let's Clear the Air: Enforcing Civil Penalties Against Federal Violators of the Clean Air Act*, 6 ENVTL. LAW 839 (June 2000).

<sup>208</sup> U.S. CONST. art II, § 1, cl. 1.

<sup>209</sup> See *Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. Off. Legal Counsel 131, 138 (1989); *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. Off. Legal Counsel 79 (1977).

<sup>210</sup> See 28 U.S.C. §§ 516-519 (2004).

<sup>211</sup> U.S. CONST. art III, § 2 ("The judicial power shall extend to...Cases ...[and] Controversies...")

interpreted Article III to require an adversarial relationship between the parties involved in litigation to ensure that the judicial branch will address actual controversies and not render advisory opinions.<sup>212</sup> To have an actual case or controversy requires adversity. Generally, a person cannot sue himself due to the absence of adversity.<sup>213</sup> A lawsuit involving the same person as plaintiff and defendant does not constitute an actual controversy.<sup>214</sup> This principle applies to lawsuits between members of the executive branch.<sup>215</sup>

DoJ's Office of Legal Counsel generally holds that lawsuits between agencies are not justiciable because there is no "case or controversy" if the action is between two

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<sup>212</sup> See *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

<sup>213</sup> *United States v. ICC*, 337 U.S. 426, 431 (1949) (referring to the established principle that a person cannot create a justiciable controversy against himself.)

<sup>214</sup> *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419 (1862); see also 13 Op. Off. Legal Counsel, *supra* note 249 at 138.

<sup>215</sup> *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1082 (D. Colo. 1985); *United States v. Easement and Right of Way over Certain Land in Bedford County, Tenn.*, 204 F. Supp. 837, 839 (E.D. Tenn 1962); *Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2<sup>nd</sup> Cir.), *cert. denied*, 326 U.S. 746 (1945); see also 13 Op. Off. Legal Counsel at 138-139.

members of the executive branch.<sup>216</sup> The Supreme Court has decided cases that appeared to be between two members of the executive branch. However, these suits were only nominally between two agencies; one of the executive agencies was not the "real party in interest" but a stand-in for private interests.<sup>217</sup> The Supreme Court made the "real party in interest" distinction in *United States v. ICC*, where the United States, in its role as a shipper, contended that charges imposed on it by railroads violated a statute.<sup>218</sup> The United States unsuccessfully filed a claim against the railroads before the Interstate Commerce Commission, and then brought an action in court to set aside the Commission's order. Pursuant to statute, the United States was made a defendant in this action. While recognizing the argument that the suit was nonjusticiable, the Supreme Court held:

[W]hile this case is *United States v. United States, et al.*, it involves controversies of a type which are traditionally justiciable. The basic question is whether railroads have

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<sup>216</sup> 1 Op. Off. Legal Counsel 79, *supra* note 210 at 83-84; 13 Op. Off. Legal Counsel, *supra* note 210 at 138-139. (The DoJ's Office of Legal Counsel is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality.)

<sup>217</sup> 1 Op. Off. Legal Counsel, *supra* note 210 at 81.

<sup>218</sup> *United States v. ICC*, 337 U.S. 426.

illegally exacted sums of money from the United States....This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads....Consequently, the established principle that a person cannot create a justiciable controversy has no application here.<sup>219</sup>

The Court decided that the lawsuit was justiciable because the real party in interest as defendant was the railroads, and not the United States.<sup>220</sup> The Court has applied the same reasoning to other cases in which at least nominally the United States appeared as both plaintiff and defendant.<sup>221</sup> For justiciability purposes, however, one of the members of the executive branch was not the real party in interest, and the suit was really between a private party and the government.

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<sup>219</sup> *Id.* at 430-31.

<sup>220</sup> *Id.* at 432.

<sup>221</sup> See *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89 (1983) (dispute between National Treasury Employees Union and the Bureau over reimbursement of a union representative for travel expenses); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (dispute between non-federal power companies and Secretary of Interior); *Secretary of Agriculture v. United States*, 347 U.S. 645, 647 (1954) (Secretary of Agriculture appeared on behalf of affected agricultural interests); *United States ex. rel Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953) (dispute between Secretary of Interior and a private power company).

Applying the concept of the "real party in interest" to a hypothetical lawsuit between the ATO and an executive branch agency, DOJ could view this lawsuit as being "nominally" between two units of the executive branch in the sense that the dispute is actually between the federal employees and/or their union and the agency. The ATO is merely the "stand-in" for the federal employees and their union.<sup>222</sup> One cannot ignore, however, the fact that the ATO only has statutory authorization to file a bid protest at GAO, and not in federal courts. In the other cases cited,<sup>223</sup> the agency was acting pursuant to statutory authority to represent the interests of a private party. The ATO will have to assert that their statutory authority flows from the ADRA based on their "interested party" status.

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<sup>222</sup> See *United States v. ICC*, 337 U.S. at 431.

<sup>223</sup> See *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89 (1983) (dispute between National Treasury Employees Union and the Bureau over reimbursement of a union representative for travel expenses); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (dispute between non-federal power companies and Secretary of Interior); *Secretary of Agriculture v. United States*, 347 U.S. 645, 647 (1954) (Secretary of Agriculture appeared on behalf of affected agricultural interests); *United States ex. rel Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953) (dispute between Secretary of Interior and a private power company).

Although the CAFC appeared to adopt CICA's definition of "interested party" so as to merge its standing requirements with GAO's standing requirements, it is not likely that COFC will accept the ATO as an "interested party." The CAFC's adoption of GAO's definition of "interested party" for standing purposes was based on the concept that Congress intended for the federal courts to share jurisdiction over actions brought by disappointed bidders.<sup>224</sup> Despite the fact that GAO's definition of "interested party" has expanded, the COFC most likely will not follow this lead and expand their own standing requirements to include an ATO because they do not fall squarely into the traditional role of disappointed bidders.

In addition, one cannot avoid the political reality of competitive sourcing--that the present administration only tolerated federal employees to have this much appellate relief<sup>225</sup> at GAO, and will likely seek to limit any expansion of these rights into the federal courts.<sup>226</sup> Even

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<sup>224</sup> American Federation of Government Employees v. United States, 258 F.3d at 1299-1301.

<sup>225</sup> Stephen Barr, *Accord Reached on Appealing 'Competitive Sourcing' of Jobs*, Washington Post (Oct. 11, 2004).

<sup>226</sup> See Statement by the President, Office of the Press Secretary, (Oct. 28, 2004) available at <http://www.whitehouse.gov/news/releases/2004/10/print/20041029-6.html> (President Bush indicated in his signing statement accompanying H.R. 4200, the Ronald W. Reagan



if the unions happen to encounter an ATO willing to think outside the box, DoJ will likely foreclose any attempt at litigation. As the gatekeeper of federal litigation, DoJ controls access to federal courts and it will likely bar the gate to ATOs and the interests they represent.

## VI. CONCLUSION

### A. Increased Accountability Achieved?

The CICA amendments sought to introduce increased accountability into the A-76 process. As the Comptroller General noted, "[H]aving a way for the MEO's to protest would engender a perception of fairness, which is important to creating trust in the A-76 process, as well as to helping increase transparency and improve accountability in this important area."<sup>227</sup>

The CICA amendments may fail to provide any substantial gains for federal employees and, therefore, may fail to achieve greater accountability in the A-76 process. There are several impediments to the promise of greater

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National Defense Authorization Act for Fiscal Year 2005 that "[T]he executive branch shall construe section 326 (CICA amendments) in a manner consistent with the President's constitutional authority to supervise the unitary executive branch, including the making of determinations under section 326.").

<sup>227</sup> Walker, *supra* note 13.

accountability. First, the ATO has power over the federal employees' right to protest. Second, there is an inherent conflict of interest between the ATO and the agency they serve and the difficulties associated with providing legal support for the ATO. Finally, the federal acquisition workforce is ill-prepared to properly execute A-76 competitions.

Two issues require consideration. First, what interests are served by allowing federal employees to protest in A-76 competitions to GAO? Second, are these rights secured by allowing only the ATO to bring protests to GAO at the request of a majority of the directly affected federal employees?

#### *1. Interests Served by Allowing Federal Employees the Right to Protest*

Obviously, the federal employees' primary interest in securing the right to protest is to save their jobs. While this may be dismissed as selfish, such "selfish" interests underpin the interests of private contractors in securing a similar right to protest.<sup>228</sup> It can be plainly asked why a

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<sup>228</sup> *Then and Now: An Update on the Administration's Competitive Sourcing Initiative, Hearing Before the Subcomm. on Oversight of Government Management, and the Federal Workforce, and the District of Columbia of the*

contractor's rights to protest should be the only ones to be vindicated in the context of an A-76 competition and why only errors committed to the detriment of contractors should be subject to correction, and not errors committed to the detriment of federal employees?<sup>229</sup>

One powerful argument for federal employees and/or their unions to have equal rights to protest at GAO and COFC is that this right will arguably ensure greater accountability of and integrity in, the government procurement system.<sup>230</sup> Similar to the argument that underpins private contractors' rights to standing to protest the award of federal contracts, granting federal employees and their unions the right to protest A-76 competitions will allow federal employees and their unions to act as a *private attorney general*.<sup>231</sup> As the Court of Appeals for the District of Columbia noted in *Scanwell Laboratories, Inc. v. Shaffer*, in granting private

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*Senate Governmental Affairs Comm.*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003) (Statement of Professor Charles Tiefer, University of Baltimore Law School), available at <http://www.bna.com/webwatch/compsource.htm>.

<sup>229</sup> *Id.*

<sup>230</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

<sup>231</sup> *Id.* at 864.

contractors the right to protest the award of federal contracts in district courts.

[T]he essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private attorney general.<sup>232</sup>

Although some reject the value of a private attorney general to a public procurement system,<sup>233</sup> the concept generally is acknowledged as providing a much needed third-

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<sup>232</sup> *Id.* at 864.

<sup>233</sup> Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U.L. REV. 627, 679 (2001):

Professor Kelman, and other opponents of litigation, offer a visceral, and at times, compelling parade of horrors associated with litigation in Federal procurement. ...Professor Kelman's primary complaints are that (1) protests and disputes are expensive and time-consuming; (2) in contractual litigation, individual civil servants may twist in the wind, subjected to zealous advocates, soiling the well of government-industry partnership; and (3) protests and disputes, undoubtedly prompt risk-averse, and potentially time consuming, behavior amongst procurement personnel, such as increased (and at times, excessive) documentation of source selection or contract administration decisions.

party check on the public procurement system.<sup>234</sup>

Litigation, in the form of protests and disputes, serves not only to protest the litigator's own interests, but also to advance the public interest in securing a public procurement system that is impartial, transparent, efficient, and competitive.<sup>235</sup>

In a robust protest regime, the threat of protests spurs risk-averse behavior, causing many within the procurement community to comply more faithfully with the relevant statutes, regulations, and policies. A broad range of protests produce precedent that interprets evolving standard solicitation provisions and contract clauses, and clarifies proper agency procurement practices. In turn, this precedent increases certainty, which reduces the government's and the private sector's transaction costs (or, in other words, increases systemic efficiency). By enhancing compliance and generating precedent, protest activity increases the system's transparency. Protests also enhance competition by giving potential offerors confidence in the level nature of the playing field.<sup>236</sup>

Providing federal employees with A-76 protest rights will only not advance the personal interests of the federal

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<sup>234</sup> *Id.* at 679. ("A robust litigation regime offers potent deterrence. It is easy to forget that protests and disputes—challenges to the contract award process and agency decision-making—help reinforce the impartiality that defines our procurement system.")

<sup>235</sup> *Id.* at 692.

<sup>236</sup> *Id.* at 693.

employees affected, but also the public interest in maintaining a procurement system that is responsive to the needs of all stakeholders. It is difficult to see, however, how those rights are vindicated by the current amendments.

## *2. Federal Employees Interests Secured by ATO Representation?*

Although an ATO is charged with filing a protest at the request of a majority of federal employees affected by an A-76 competition (unless he or she determines that there is no reasonable basis to do so), the ATO's determination is not subject to administrative or judicial review.<sup>237</sup> Some have indicated that an ATO has *an ethical and legal responsibility* to file protests when they believe that federal employees have a valid complaint.<sup>238</sup> This reasoning, however, is subject to the reality that ATOs will likely be senior managers within their agencies, have little incentive to file protests against their own agencies, and powerful incentives to not file such protests. If you couple this lack of incentive with the

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<sup>237</sup> 31 U.S.C. §§ 3551, 3553(a) (2004).

<sup>238</sup> Gruber, *supra* note 67.

fact that legal representation issues for ATOs have not been clearly resolved by federal agencies, it becomes apparent that the ATO may be an ineffective tool through which to guarantee the protest rights of federal employees and to achieve the ultimate goal of greater accountability in the A-76 process. Proponents of the new legislation are quick to point out that the new amendments also require that an ATO "shall provide written notification to Congress whenever the official determines that there is no reasonable basis for the protest."<sup>239</sup> Although Congressional oversight of the ATO function may have some deterrent effect, others are less sanguine.<sup>240</sup>

Federal employees' rights are not completely undercut. The CICA amendments allow unions to file for intervenor status at GAO in the event that an ATO files a protest in an A-76 competition that affects the employees the union

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<sup>239</sup> 31 U.S.C. § 3552(b)(2).

<sup>240</sup> Amelia Gruber, *supra* note 67. ("John Threlkeld, a lobbyist for AFGE, said the union has 'brought numerous instances of contracting injustices' to the attention of the House Government Reform and Armed Services committees, to no avail... 'Based on their own records, asking the chairs of those two committees to act as impartial checks on agency tender officials is futile. ...We'd have more luck petitioning the contractors.'").

represents.<sup>241</sup> The right to intervenor status, however, does not mitigate the harm done to federal employees' rights to protest A-76 competitions and the concomitant harm done to the ultimate goal of achieving greater accountability in all sourcing decisions.<sup>242</sup> Union rights to intervene in a protest remains subject to the decision-making power of the ATO. The rights of federal employees, therefore, are granted but second-class status under the present protest scheme.

### *3. Final Call: Failure to Achieve Greater Accountability*

Federal employees deserve an equal voice in the A-76 competition. To provide equal protest rights will not only serve the interests of the federal employees but will also achieve greater accountability in the A-76 process.<sup>243</sup> If

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<sup>241</sup> 31 U.S.C. § 3553(g). ("If an interested party files a protest in connection with a public-private competition described in section 3551(2)(B) of this title, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition may intervene in protest.")

<sup>242</sup> *Id.*

<sup>243</sup> Ralph C. Nash & John Cibinic, *A-76 Competitions: Right of Employees to Protest*, 18 Nash & Cibinic Rep. 36 ¶ 8 (August 2004):

Giving agency employee protest rights equal to those of competing contractors seems fair to us. There is just as much chance that the agency



one takes into consideration the overall good that federal employee protest rights serve in the federal procurement system and couple this overall good with the fact that the current appellate mechanism will not secure these rights, it becomes clear that the current amendments should be altered. At the very least, Congress should amend CICA to allow administrative and judicial review of the ATO's decision to not file a protest.<sup>244</sup> This would secure some impartiality in the process and deter against arbitrary and ATO capricious actions.<sup>245</sup> Although hailed as a *huge step forward* for federal employees and for the overall A-76 reform efforts to achieve greater accountability, this advance likely will fall short of its objectives, and further complicate a competition mechanism already beset by problems.<sup>246</sup>

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source selection official will violate the rules of the game to the detriment of the MEO as there is that violations will harm a competing company. Thus, simple fairness dictates that either party be given the means of correcting such a violation. If there is a side benefit that agency employees will gain greater trust that they are being fairly treated in these A-76 competitions, so much the better.

<sup>244</sup> 31 U.S.C. §§ 3551, 3553(a) (2004).

<sup>245</sup> *Id.*

<sup>246</sup> Schooner, *Competitive Sourcing Policy*, *supra* note 19, at 264.

## B. Improving the Competitive Sourcing Process?

The CICA amendments' potential failure to achieve greater accountability in the A-76 process is another setback for competitive sourcing. These amendments may cause more problems than they solve. One, there are difficulties inherent in pitting one part of a federal agency against another part of that same agency. Second, there are weaknesses inherent in the federal acquisition workforce charged with carrying out the A-76 process. Finally, there are unanswered questions regarding protective orders and intervenor status at the GAO.

With all of the difficulties that flow from the CICA amendments and the competitive sourcing process itself, one must question why the federal government places so much emphasis on this system. *The federal government should not be competing with the private sector.* This is not a novel concept.<sup>247</sup> A better process (and one that will save money for the federal government in the long run) is for agencies to make a management decision with regard to which activities are inherently governmental or commercial and compete those activities that are commercial. If an

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<sup>247</sup> *Id.* at 274.

activity does not fall squarely into one or the other, then the federal government can make a management decision to either retain that function or compete it, depending on the particular circumstances involved. The federal government should eliminate the step where it now competes with the private sector for these activities. This additional layer of process does not add any measured benefit and may cause more problems and cost more money in the long run. The A-76 process is being held hostage by various political interests, and those A-76 public-private competitions are a by-product of political pressure. Key decision-makers, however, should rise above the political fray and implement changes that, while challenging and hard-to-swallow-will in the end provide a better result for the federal government, its employees, and taxpayers.

## Appendix

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. SEC. 326. BID PROTESTS BY FEDERAL EMPLOYEES IN ACTIONS UNDER OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76.

(a) TREATMENT OF AGENCY TENDER OFFICIAL AS INTERESTED PARTY- Section 3551(2) of title 31, United States Code, is amended-

(1) by inserting `(A)' after `(2)'; and

(2) by adding at the end the following new subparagraph:

`(B) The term includes the official responsible for submitting the Federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency.'.

(b) FILING OF PROTEST ON BEHALF OF FEDERAL EMPLOYEES- Section 3552 of such title is amended--

(1) by inserting `(a)' before `A protest'; and

(2) by adding at the end the following new subsection:

`(b)(1) In the case of an agency tender official who is an interested party under section 3551(2)(B) of this title, the official may file a protest in connection with the public-private competition for which the official is an interested party. At the request of a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to such public-private competition, the official shall file a protest in connection with such public-private competition unless the official determines that there is no reasonable basis for the protest.

`(2) The determination of an agency tender official under paragraph (1) whether or not to file a protest is not subject to administrative or judicial review. An agency tender official shall provide written notification to Congress whenever the official makes a determination under paragraph (1) that there is no reasonable basis for a protest.'.

(c) INTERVENTION IN PROTEST- Section 3553 of such title is amended by adding at the end the following new subsection:

`(g) If an interested party files a protest in connection with a public-private competition described in section 3551(2)(B) of this title, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition may intervene in protest.'

(d) APPLICABILITY- The amendments made by this section shall apply to protests filed under subchapter V of chapter 35 of title 31, United States Code, that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the 90-day period beginning on the date of the enactment of this Act.

(e) RULE OF CONSTRUCTION- The amendments made by this section shall not be construed to authorize the use of a protest under subchapter V of chapter 35 of title 31, United States Code, with regard to a decision made by an agency tender official.